TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 417

H. F. FERRY, PLAINTIFF IN ERROR,

vs.

A. L. LLOYD, C. L. KING, AND L. D. HADLEY

No. 418

C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED, PLAINTIFF IN ERROR,

vs.

A. L. LLOYD, C. L. KING, H. F. FERRY, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

FILED JULY 28, 1927

(32,869, 32,870)

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[fols. a-c] [Captions omitted.]

[fols. d-440] Minute entry of argument and submission Nov. 5, 1926, omitted in printing.

IN SUPREME COURT OF KANSAS

[fols. 441-444]

No. 27396

A. E. Lloyd, Appellant,

v.

E. F. Adams et al., Appellees

Judgment—February 12, 1927

These causes come on for decision and thereupon it is ordered and adjudged that Judgment in favor of T. L. Harris as executor of the estate of T. A. Kramer deceased, be reversed and remanded with instructions to render judgment for the plaintiff, and in other respects the judgment is affirmed. It is further ordered that the defendants pay the costs of this case in this court taxed at $— and hereof let execution issue.

[fols. 445 & 446] Petition for rehearing, covering 1 page, filed April 3, 1927, omitted from this print. It was denied and nothing more by order April 16, 1927.

[fols. 447 & 448] Petition for rehearing, covering 60 pages, filed Mar. 10, 1927, omitted from this print. It was denied and nothing more by order April 16, 1927.

[fol. 449] IN SUPREME COURT OF KANSAS

[Title omitted]

ORDER DENYING REHEARING—April 16, 1927

Now comes on for decision the motion for a rehearing of these causes; and thereupon it is ordered that said motion for a rehearing be overruled.

[fols. 450 & 451] Clerk's certificate to foregoing Transcript omitted in printing.

[fols. 452 & 452½] IN SUPREME COURT OF KANSAS

[Title omitted]

[File endorsement omitted.]

PETITION FOR WRIT OF ERROR—Filed June 15, 1927

To the Honorable Chief Justice of the Supreme Court of the State of Kansas:

Your petitioner, H. F. Ferry, respectfully shows that on the 16th day of April A. D., 1927, the Supreme Court of the State of Kansas, rendered a final judgment and decision against your petitioner in the above entitled cause, affirming the judgment of the District Court of Butler County, Kansas, against your petitioner and in favor of A. E. Lloyd, appellant and cross-appellee, and remanding said cause to the District Court of Butler County, Kansas, with instruction to carry out the judgment in favor of the said A. E. Lloyd and against your petitioner, the appeal notwithstanding, all as will more fully appear by reference to the record and proceedings in said cause.

That said Supreme Court of the State of Kansas, is the highest court of the State of Kansas, in which a decision in said suit could be had, and considering himself aggrieved by said final decision of the Supreme Court of the State of Kansas, your petitioner hereby prays the allowance of a writ of error from the said decision and judgment

of the Supreme Court of the State of Kansas, to the Supreme Court of the United States, and for a citation and an order fixing the amount of bond.

And your petitioner will ever pray, etc.

L. J. Bond, El Dorado, Kans., Attorneys for petitioner.

[fols. 453 & 453½] In Supreme Court of Kansas

[Title omitted]

[File endorsement omitted.]

Petition for Writ of Error—Filed June 15, 1927

To the Honorable Chief Justice of the Supreme Court of the State of Kansas:

Your petitioner, C. L. Harris, executor of the last will and testament of T. A. Kramer, deceased, respectfully shows that on the 16th day of April, A. D., 1927, the supreme court of the State of Kansas, rendered a final judgment and decision against your petitioner in the above entitled cause, reversing the judgment of the District Court of Butler County, Kansas, in your petitioner's favor, and remanding said cause to said District Court of Butler County, Kansas, with instructions to render judgment in favor of said appellant A. E. Lloyd, and against your petitioner, as will more fully appear by reference to the record and proceedings in said cause.

That said supreme court of the State of Kansas is the highest court of the State of Kansas, in which a decision in said suit could be had, and considering himself aggrieved by said final judgment and decision of the Supreme court of the State of Kansas, your petitioner hereby prays the allowance of a writ of error from the said decision and judgment of the supreme court of the State of Kansas, to the Supreme Court of the United States, and for a citation and an order fixing the amount of bond.

And your petitioner will ever pray, etc.

C. L. Harris, El Dorado, Kans.; Bruce A. Compbell, East St. Louis; Bennett R. Wheeler, S. M. Brewster, John L. Hunt, Topeka, Kans., Attorneys for petitioner.

[fol. 454] IN SUPREME COURT OF KANSAS

[Title omitted]

[File endorsement omitted.]

ASSIGNMENTS OF ERROR—Filed June 15, 1927

Now comes the appellant, H. F. Ferry, and in connection with his petition for a writ of error and as an assignment of errors, says:

That during all the time mentioned in the above entitled cause, he was a citizen of the State of Kansas, and a citizen of the United States of America; that the above entitled cause is one in which the appellee, A. E. Lloyd, sought to recover from said appellant, the sum of $915.77 with interest, under the provisions of certain statutes of the State of Kansas, which are hereinafter set out, on account of the alleged violation of said statutes by said appellant while a director of the Butler County State Bank, a banking corporation organized and doing business under the laws of the State of Kansas, and in Butler County, Kansas.

Said appellant says, that in the above entitled cause in the trial court, being the District Court of Butler County, Kansas, and in the Supreme Court of the State of Kansas, the validity of Section 9-163 of the Revised Statutes of the State of Kansas, for the year 1923, to wit:

"It shall be unlawful for any president, director, manager, cashier, or other officer of any banking institution to assent to the reception of deposits or the creation of debts by such banking institution, after he shall have had knowledge of the fact that it is insolvent or in failing circumstanes; and it is hereby made the duty of every such officer, agent, or manager of such banking institution to examine into the affairs of the same and if possible to know its condition. And upon failure of any such person to discharge such duties, he shall, for the purpose of this act, be held to have had knowledge of the insolvency of such bank, or that it was in failing circumstances. Every person violating the provisions of this section shall be individually responsible for such deposits so received and all such debts [fol. 455] so contracted: Provided, any director who may

have paid more than his share of the liabilities mentioned in this section, may have the proper remedy at law against such other person as shall not have paid their full share of liabilities."

was drawn in question by said appellant on the ground that said statute in question was repugnant to the Constitution of the United States, and the decision of the Supreme Court of the State of Kansas, was in favor of the validity and constitutionality of said statute.

And in the trial court and in the Supreme Court of the State of Kansas, the validity of Section 9-164 of the Revised Statutes of the State of Kansas, for the year 1923, to wit:

"In all suits brought for the recovery of the amount of any deposit received or debts so created, all officers, agents or managers of any such banking institution, charged with having so assented to the reception of such deposit or the creation of such debt, may be joined as defendants or proceeded against severally; and the fact that such banking institution was so insolvent or in failing circumstances at the time of the reception of the deposits charged to have been so received, or the creation of the debt charged to have been so created, shall be prima facie evidence of such knowledge and assent to such deposits or creation of such debts on the part of such officers, agent or manager so charged therewith."

was drawn in question by said appellant on the ground of said statute being repugnant to the Constitution *to* the United States, and the decision of the Supreme Court of the State of Kansas, was in favor of the validity of said statute.

And said appellant respectfully says that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Kansas, in the above entitled cause, there is manifest error in this, to wit:

First: The Supreme Court of the State of Kansas, erred in holding and deciding that the provisions of Section 9-163 Revised Statutes of the State of Kansas, were valid and were not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Second: The Supreme Court of the State of Kansas, erred in holding and deciding that the provisions of Section 9-164 Revised Statutes of the State of Kansas, were valid and were not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

[fols. 456 & 456½] Third. The Supreme Court of the State of Kansas, erred in holding and deciding that by the provisions of Section 9-163 of the Revised Statutes of the State of Kansas, said appellant was not deprived of privileges and immunities secured to other citizens of the United States.

Fourth. The Supreme Court of the State of Kansas, erred in holding and deciding that by the povisions of Section 9-164 of the Revised Statutes of the State of Kansas, said appellant was not deprived of privileges and immunities secured to other citizens of the United States.

Fifth. The Supreme Court of the State of Kansas, erred in holding and deciding that by the provisions of Section 9-163 of the Revised Statutes of the State of Kansas, the said appellant was not deprived of property without due process of law.

Sixth. The Supreme Court of the State of Kansas, erred in holding and deciding that by the provisions of Section 9-164 of the Revised Statutes of the State of Kansas, the said appellant was not deprived of property without due process of law.

Seventh. The Supreme Court of the State of Kansas, erred in holding and deciding that by the provisions of Section 9-163 of the Revised Statutes of the State of Kansas, the appellant was not denied equal protection of the law.

Eighth. The Supreme Court of the State of Kansas, erred in holding and deciding that by the provisions of Section 9-164 of the Revised Statutes of the State of Kansas, the appellant was not denied equal protection of the law.

For which errors the said appellant H. F. Ferry, prays that said judgment of the Supreme Court of the State of

Kansas, be reverted and a judgment be rendered in favor of said appellant and for costs.

L. J. Bond, El Dorado, Kans., Attorneys for H. F. Ferry.

[fol. 457] IN SUPREME COURT OF KANSAS

[Title omitted]

[File endorsement omitted.]

ASSIGNMENTS OF ERROR—Filed June 15, 1927

Now comes the appellee, C. L. Harris, as executor of the last will and testament of T. A. Kramer, deceased, and in connection with his petition for a writ of error and as assignment of errors, says:

That he is now and during all the time mentioned in the above entitled cause, was a citizen of the State of Kansas, and a citizen of the United States of America, as was also during his life time the said T. A. Kramer; that the above entitled cause is one in which the appellant, A. E. Lloyd, sought to recover from said appellee the sum of $915.77 with interest, under the provisions of certain statutes of the State of Kansas, which are hereinafter set out, on account of the alleged violation of said statutes by said appellee's decedent, T. A. Kramer, while a director of the Butler County State Bank, a banking corporation organized and doing business under the laws of the State of Kansas, and in Butler County, Kansas.

Said appellee says that in the above entitled cause in the trial court, being the District Court of Butler County, Kansas, and in the Supreme Court of the State of Kansas, the validity of Section 9-163 of the Revised Statutes of the State of Kansas, for the year 1923, to wit:

"It shall be unlawful for any president, director, manager, cashier or other officer of any banking institution, to assent to the reception of deposits or the creation of debts by such banking institution, after he shall have had knowledge of the fact that it is insolvent or in failing circumstances; and it is hereby made the duty of every such officer,

agent or manager of such banking institution, to examine into the affairs of same, and if possible, to know its condition. And upon failure of any such person to discharge such duty, he shall, for the purpose of this act, be held to have had knowledge of the insolvency of such bank or that [fol. 458] it was in failing circumstances. Every person violating the provisions of this section shall be individually responsible for such deposit so received and all such debts so contracted: Provided, any director who may have paid more than his share of the liabilities mentioned in this section, may have the proper remedy at law against such other persons as shall not have paid their full share of such liabilities."

was drawn in question by said appellee on the ground that said statute in question was repugnant to the constitution of the United States, and the decision of the Supreme Court of the State of Kansas, was in favor of the validity and constitutionality of said statute.

And in the trial court and in the Supreme Court of the State of Kansas, the validity of Section 9-164 of the Revised Statutes of the State of Kansas, for the year 1923, to wit:

"In all suits brought for the recovery of the amount of any deposits received or debt so created, all officers, agents or managers of any such banking institutions, charged with having so assented to the reception of such deposit, or the creation of such debt, may be joined as defendants or proceeded against severally; and the fact that such banking institution was so insolvent or in failing circumstances at the time of the reception of the deposit charged to have been so received, or the creation of the debt charged to have been so created, shall be prima facie evidence of such knowledge and assent to such deposit or creation of such debt on the part of such officer, agent or manager so charged therewith."

was drawn in question by said appellee on the ground of said statute being repugnant to the constitution of the United States, and the decision of the Supreme Court of the State of Kansas, was in favor of the validity of said statute.

And said appellee respectfully says that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Kansas, in the above entitled cause, there is manifest error in this, to wit:

First. The Supreme Court of the State of Kansas, erred in holding and deciding that the provisions of Section 9-163 of the Revised Statutes of the State of Kansas, were valid and were not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Second. The Supreme Court of the State of Kansas, erred in holding and deciding that the provisions of Section 9-164 of the Revised Statutes of the State of Kansas, were valid and were not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

[fol. 459] Third. The Supreme Court of the State of Kansas, erred in holding and deciding that by the provisions of Section 9-163 of the Revised Statutes of the State of Kansas, said appellee was not deprived of privileges and immunities secured to other citizens of the United States.

Fourth. The Supreme court of the State of Kansas, erred in holding and deciding that by the provisions of Section 9-164 of the Revised Statutes of the State of Kansas, said appellee was not deprived of privileges and immunities secured to other citizens of the United States.

Fifth. The Supreme Court of the State of Kansas, erred in holding and deciding that by the provisions of Section 9-163 of the Revised Statutes of the State of Kansas, the said appellee was not deprived of property without due process of law.

Sixth. The Supreme Court of the State of Kansas, erred in holding and deciding that by the provisions of Section 9-164 of the Revised Statutes of the State of Kansas, the said appellee was not deprived of property without due process of law.

Seventh. The Supreme Court of the State of Kansas, erred in holding and deciding that the provisions of said

Section 9-163 of the Revised Statutes of the State of Kansas, did not deny to said appellee equal protection of the law.

Eighth. The Supreme Court of the State of Kansas, erred in holding and deciding that the provisions of said Section 9-164 of the Revised Statutes of the State of Kansas, did not deny to said appellee equal protection of the law.

Ninth. The Supreme Court of the State of Kansas, erred in holding and deciding that the provisions of said Section 9-163 Revised Statutes of the State of Kansas, as interpreted by the Supreme Court of the State of Kansas, did not deny to said appellee equal protection of the law, in depriving him of the right and benefit of showing that it was impossible for his decedent, T. A. Kramer, to make examination into the affairs of the said Butler County State Bank, during the time in question in said cause.

Tenth. The Supreme Court of the State of Kansas, erred in holding and deciding that the provisions of said Section 9-163 Revised Statutes of the State of Kansas, which provide that if an officer or director of a bank does not examine into the affairs of the bank, he shall be held to have knowle-ge of the condition of the bank, were not in violation of the Fourteenth Amendment to the Constitution of the United States, and did not, as interpreted by said court, deprive appellee of property without due process of law, when the circumstances were that during the time in question it was impossible for said appellee's decedent, T. A. Kramer, a director of said bank to make an examination of said bank.

[fols. 460 & 460a] Eleventh: The Supreme Court of the State of Kansas, erred in holding and deciding that the provisions of said section 9-163 Revised Statutes of the State of Kansas, which by its terms created a conclusive presumption of knowledge against said appellee's decedent, T. A. Kramer, were not in violation of the Fourteenth Amendent to the Constitution of the United States.

Twelfth: The Supreme Court of the State of Kansas, erred in holding and deciding that the provisions of said Section 9-164 Revised Statutes of the State of Kansas,

which by its terms made the fact that the said banking institution was insolvent or in failing circumstances at the time of the reception of the deposits charged to have been received, prima facie evidence of the assent of said appellee's decedent, T. A. Kramer, to such deposit, were not in violation of the Fourteenth Amendment to the Constitution of the United States.

Thirteenth: The Supreme Court of the State of Kansas, has held and decided herein, that the provisions of said section 9-163 Revised Statutes of the State of Kansas, created a conclusive presumption of knowledge and has held and decided herein that under said provisions said appellee would not be permitted to show any reason or excuse whatsoever, why his decedent, T. A. Kramer, had not made an examination into the affairs of the said Butler County State Bank, and in so holding and deciding, erred in holding and deciding that said statute as so interpreted was not in violation of the Fourteenth Amendment to the Constitution of the United States.

For which errors the said appellee, C. L. Harris, executor of the last will and testament of T. A. Kramer, deceased, prays that said judgment of the Supreme Court of the State of Kansas, be reversed and a judgment be rendered in favor of said appellee and for costs.

Bruce A. Campbell, East St. Louis, Bennett R. Wheeler, S. M. Brewster, John L. Hunt, Topeka, Kansas, Attorneys for C. L. Harris, Executor of the last will and testament of T. A. Kramer, deceased.

[fols. 460b & c] In Supreme Court of Kansas

[Title omitted]

[File endorsement omitted.]

Order Allowing Writ of Error—Filed June 15, 1927

The above entitled matter coming on to be heard upon the petition of H. F. Ferry, appellant therein, for writ of error from the Supreme Court of the United States, to the Supreme Court of the State of Kanasas, and upon examination

of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter:

It is ordered that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioner be, and the same is hereby approved.

W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas.

[fol. 461 & 461½] In Supreme Court of Kansas

[Title omitted]

[File endorsement omitted.]

Order Allowing Writ of Error—Filed June 15, 1927

The above entitled matter coming on to be heard, upon the petition of C. L. Harris, as executor of the last will and testament of T. A. Kramer, deceased, appellee therein, for writ of error from the Supreme Court of the United States, to the Supreme Court of the State of Kansas, and upon examination of said petition and the record in said matter, and desiring to give the petition an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter.

It is ordered that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioner be, and the same is hereby approved.

W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas.

[fols. 462 & 462½] In Supreme Court of Kansas

[Title omitted]

Order Fixing Bond

Now on this 15th day of June 1927, came on to be heard the application of H. F. Ferry, appellant, for an order fix-

ing the amount of the bond for costs on appeal to the Supreme Court of the United States, in the above entitled action, and the court being fully informed in the premises, doth fix the amount of said bond for costs at One Thousand Dollars ($1,000.00) conditioned that the said H. F. Ferry, shall pay all costs that may accrue in said action, to the parties to this action, or to the officers of this court, or to the officers of the Supreme Court of the United States or any other person, in case he shall be adjudged to pay them, or in case the same cannot be collected from the other parties to this action, if judgment be obtained against them, then that the said H. F. Ferry will pay all such costs.

Said bond to be approved by the clerk of said court.

W. A. Johnston, Chief Justice.

[fols. 463 & 463½] In Supreme Court of Kansas

[Title omitted]

Order Fixing Bond

Now on this 15th day of June, 1927, came on to be heard the application of C. L. Harris, as executor of the last will and testament of T. A. Kramer, deceased, appellee, for an order fixing the amount of the bond for costs on appeal to the Supreme Court of the United States in the above entitled action, and the court being fully informed in the premises, doth fix the amount of said bond for costs at One Thousand Dollars ($1,000.00), conditioned that the said C. L. Harris, as such executor, shall pay all costs that may accrue in said action, to the parties to this action, or to the officers of this court or to the officers of the Supreme Court of the United States or any other yersons, in case he shall be adjudged to pay them; or in case the same cannot be collected from the other parties to this action, if judgment be obtained against them, then that the said C. L. Harris, as such executor, will pay all such costs.

Said bond to be approved by clerk of said court.

W. A. Johnston, Chief Justice.

[fols. 464 & 464½] IN SUPREME COURT OF KANSAS

WRIT OF ERROR—Filed June 15, 1927

[File endorsement omitted.]

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Kansas, Greetings:

Because in the record, proceedings and judgment in a cause lately pending in the Supreme Court of the State of Kansas, being the highest court of the said State, in which a decision in the cause could be had, between A. E. Lloyd, appellant and appellee, vs. C. L. Harris, as executor of the last will and testament of T. A. Kramer, deceased, and E. F. Adams, appellees, and C. L. King, H. F. Ferry and L. D. Hadley, cross-appellants, wherein was drawn in question the validity of certain statutes of the said State of Kansas, on the ground of their being repugnant to the Constitution of the United States of America, and particularly to the Fourteenth Amendment to said Constitution, and the decision was in favor of such, their validity; it appears that the said H. F. Ferry, appellant, is entitled to have the said judgment reviewed by the Supreme Court of the United States, and he having presented a petition for a writ of error, and assignments of error to that end;

And we being willing that error, if any hath occurred, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you that under your seal, distinc-ly and openly, you send the record, proceedings and judgment aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, and that you have the same in the said Supreme Court at Washington, D. C., within thirty days from the date hereof, so that the said Supreme Court of the United States may examine and consider the same and may cause further to be done to correct the error therein if any hath occurred, as of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this 15th day of June, in the year of our Lord one thousand nine hundred and twenty-seven.

F. C. Campbell, Clerk of the U. S. District Court.

(Seal of District Court U. S., District of Kansas.)

Allowed by W. A. Johnston, Chief Justice.

[fol. 465 & 465½] In Supreme Court of Kansas

Writ of Error—Filed June 15, 1927

[File endorsement omitted.]

The United States of America, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record, proceedings and judgment in a cause lately pending in the Supreme Court of the State of Kansas, being the highest court of the said State, in which a decision in the cause could be had, between A. E. Lloyd, appellant and appellee, vs. C. L. Harris, as executor of the last will and testament of T. A. Kramer, deceased, and E. F. Adams, appellees and C. L. King, H. F. Ferry and L. D. Hadley, cross-appellants, wherein was drawn in question the validity of certain statutes of the said State of Kansas, on the ground of their being repugnant to the Constitution of the United States of America, and particularly to the Fourteenth Amendment to said Constitution, and the decision was in favor of such, their validity; it appears that the said C. L. Harris, as executor of the last will and testament of T. A. Kramer, deceased, appellee, is entitled to have the said judgment, reviewed by the Supreme Court of the United States, and he having presented a petition for a writ of error, and assignments of error to that end:

And we being willing that error, if any hath occurred, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you that under your seal, distinctly and openly, you send the record,

proceedings and judgment aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, and that you have the same in the said Supreme Court at Washington, D. C., within thirty days from the date hereof, so that the said Supreme Court of the United States may examine and consider the same and may cause further to be done to correct the error therein, if any hath occurred, as of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 15th day of June, in the year of our Lord one thousand nine hundred and twenty-seven.

F. C. Campbell, Clerk of the U. S. Dist. Court.
(Seal of District Court U. S., District of Kansas.)

Allowed by W. A. Johnston, Chief Justice.

[fols. 466-467½] Bonds on writs of error for $1,000.00 each approved and filed June 15, 1927, omitted in printing.
[fols. 468-471½] Citations in usual form showing service on John J. Jones et al., filed June 21, 1927, omitted in printing.

[fol. 472] Certificate of lodgment omitted in printing.

[fol. 473] Return to writ of error omitted in printing.

[fols. 474-480] Orders enlarging time omitted in printing.

[fol. 481] In Supreme Court of the United States, October Term, 1927

No. 417

Statement of Points on Which Plaintiff in Error Intends to Reply—Filed August 4, 1927

I

The plaintiff in error, H. F. Ferry, contends that the above entitled cause is one in which the defendant in error, A. E.

Lloyd, a depositor in the Butler County State Bank of Butler County, Kansas, sought to recover from said plaintiff in error a sum of money, under the provisions of certain statutes of the State of Kansas, which are hereinafter set out, on account of the alleged violation of said statutes by said plaintiff in error, while a director of said Butler County State Bank.

II

The plaintiff in error contends that in the above entitled cause, in the trial court and in the Supreme Court of the State of Kansas, the validity of Section 9-163 of the Revised Statutes of the State of Kansas for the year 1923, to-wit:

"It shall be unlawful for any president, director, manager, cashier, or any other officer of any banking institution to assent to the reception of any deposits or the creation of debts by such banking institution after he shall have had knowledge of the fact that it is insolvent or in failing circumstances; and it is hereby made the duty of every such officer, agent or manager of such banking institution to examine into the affairs of the same, and if possible know its condition. And upon the failure of any such person to discharge such duty, he shall, for the purpose of this act, be held to have had knowledge of the insolvency of such bank, or that it was in failing circumstances. Every person violating the provisions of this section shall be individually responsible for such deposits so received, and all such debts so contracted: Provided, any director who may have paid more than his share of the liabilities mentioned in this section may have the proper remedy at law against such other persons as shall not have paid their full [fol. 482] share of said liabilities."

was drawn in question by said plaintiff in error on the ground that said statute was repugnant to the constitution of the United States, and the decision of the Supreme Court of the State of Kansas was in favor of the validity of said statute, and that in the trial court and the Supreme Court of the State of Kansas, the validity of Section 9-164, of the Revised Statutes of the State of Kansas for the year 1923, to-wit:

"In all the suits brought for the recovery of the amount of any deposits received or debt so created, all officers, agents and managers of any such banking institutions, charged with having so assented to the reception of such deposit, or the creation of such debt, may be joined as defendants, or proceeded against severally; and the fact that such banking institution was so insolvent or in failing circumstances at the time of the reception of the deposit charged to have been so received or the creation of the debt charged to have been so created, shall be prima facie evidence of such knowledge on the part of such officer, agent or manager so charged therewith"

was drawn in question by the plaintiff in error on the ground that the statute was repugnant to the constitution of the United States, and the decision of the Supreme Court of the State of Kansas, was in favor of the validity of said statute.

III

Said plaintiff in error contends that the Supreme Court of the State of Kansas erred in holding and deciding that the provisions of said Section 9-163 of the Revised Statutes of the State of Kansas, for the year 1923, were valid, and were not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and in holding and deciding that by the provisions of said Section 9-163 of the Revised Statutes of the State of Kansas, said plaintiff in error was not deprived of privileges and immunities secured to other citizens of the United States, and was not denied the equal protection of the law.

IV

Said plaintiff in error contends that the Supreme Court of the State of Kansas erred in holding and deciding that the provisions of said Section 9-164, of the Revised Statutes of the State of Kansas, for the year 1923, were valid and were not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution [fol. 483] of the United States, and in holding and deciding that by the provisions of said section 9-164 of the Revised

Statutes of the State of Kansas, said plaintiff in error was not deprived of privileges and immunities secured to other citizens of the United States, and was not deprived of property without due process of law, and was not denied the equal protection of the law.

V

Plaintiff in error contends that the Supreme Court of the State of Kansas erred in holding and deciding that the provisions of said Section 9-163 of the Revised Statutes of the State of Kansas for the year 1923, which by its terms created a conclusive presumption of knowledge against said plaintiff in error, were not in violation of the Fourteenth Amendment to the Constitution of the United States.

VI

The plaintiff in error contends that the Supreme Court of the State of Kansas erred in holding and deciding that the provisions of said Section 9-164 of the Revised Statutes of the State of Kansas, which by its terms made the fact that the said banking institution was insolvent, or in failing circumstances at the time of the reception of the deposit charged to have been received prima facie evidence of the assent of the plaintiff in error, to such deposit, were not in violation of the Fourteenth Amendment to the Constitution of the United States.

VII

Plaintiff in error contends that the evidence in said cause fails to show that he knew the said Butler County State Bank was insolvent at the time in question, and fails to show that said Butler County State Bank was insolvent at the time in question, and that the evidence in this cause fails to show that the plaintiff in error assented to the reception of the deposits in question.

VIII

Said plaintiff in error further states that he thinks it necessary for the consideration of the above points that all [fols. 484 & 485] of the record be printed.

L. J. Bond, J. B. McKay, Attorneys for Plaintiff in Error.

Received a copy of the above statement the 29 day of July, 1927.

C. L. Harris, as Executor of the Estate of T. A. Kramer, Deceased. L. D. Hadley, C. L. King, Defendants in Error. John J. Jones, B. G. Leydig, Attorneys for A. E. Lloyd, Defendant in Error.

[fol. 486] [File endorsement omitted.]

[fol. 487] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1927

No. 418

STATEMENT OF POINTS ON WHICH PLAINTIFF IN ERROR INTENDS TO RELY—Filed July 29, 1927

I

The plaintiff in error, C. L. Harris, as executor of the last will and testment of T. A. Kramer, deceasd, contends that the above enitled cause is one in which the defendant in error, A. L. Lloyd, a depositor in the Butler County State Bank, of Butler County, Kansas, sought to recover from said plaintiff in error a sum of money, under the provisions of certain statutes of the State of Kansas, which are hereinafter set out, on account of the alleged violation of said statutes by said plaintiff in error's decedent, T. A. Kramer, while a director of said Butler County State Bank.

II

The plaintiff in error contends that in the above entitled cause, in the trial court and in the Supreme Court of the State of Kansas, the validity of Section 9-163 of the Revised Statutes of the State of Kansas, for the year 1923, to-wit:

"It shall be unlawful for any president, director, manager, cashier, or other officer of any banking institution to assent to the reception of deposits or the creation of debts by such banking institution, after he shall have had knowledge of the fact that it is insolvent, or in failing circumstances; and it is hereby made the duty of every officer,

[fol. 488] agent or manager of such banking institution to examine into the affairs of the same, and if possible know its condition. And upon failure of any such person to discharge such duty, he shall, for the purpose of this act, be held to have had knowledge of the insolvency of such bank, or that it was in failing circumstances. Every person violating the provisions of this Section shall be individually responsible for such deposits so received, and all such debts so contracted: Provided, Any director who may have paid more than his share of the liabilities mentioned in this Section may have the proper remedy at law against such other persons as shall not have paid their full share of said liabilities."

was drawn in question by said plaintiff on error on the ground of said statute's being repugnant to the Constitution of the United States, and the decision of the Supreme Court of the State of Kansas was in favor of the validity of said statute, and that in the trial court and the Supreme Court of the state of Kansas, the validity of Section 9-164 of the Revised Statutes of the State of Kansas for the year 1923, to-wit:

"In all suits brought for the recovery of the amount of any deposits received or debt so created all officers, agents or managers of any such banking institutions, charged with having so assented to the reception of such deposit, or the creation of such debt, may be joined as defendants or proceeded against severally; and the fact that such banking institution was so insolvent or in failing circumstances at the time of the reception of the deposit charged to have been so received, or the creation of the debt charged to have been so created, shall be prima facie evidence of such knowledge and assent to such deposit or creation of such debt on the part of such officer, agent or manager so charged therewith."

was drawn in question by said plaintiff in error on the ground of said statute's being repugnant to the Constitution of the United States, and the decision of the Supreme Court of the State of Kansas, was in favor of the validity of said statute.

III

Said plaintiff in error contends that the Supreme Court of the State of Kansas erred in holding and deciding that the provisions of said Section 9-163 of the Revised Statutes of the State of Kansas for the year 1923, were valid and were not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States; and in holding and deciding that by the provisions of said Section 9-163 of the Revised [fol. 489] Statutes of the State of Kansas, said plaintiff in error was not deprived of privileges and immunities secured to other citizens of the United States, and was not deprived of property without due process of law, and was not denied the equal protection of the law.

IV

Said plaintiff in error contends that the Supreme Court of the State of Kansas erred in holding and deciding that the provisions of said Section 9-164 of the Revised Statutes of the State of Kansas for the year 1923, were valid and were not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and in holding and deciding that by the provisions of said Section 9-164, of the Revised Statutes of the State of Kansas, said plaintiff in error was not deprived of privileges and immunities secured to other citizens of the United States, and was not deprived of property without due process of law, and was not denied the equal protection of the law.

V

Said plaintiff in error contends that the Supreme Court of the State of Kansas erred in holding and deciding that the provisions of said Section 9-163 of the Revised Statutes of Kansas, as interpreted by said Court did not deny to said plaintiff in error the equal protection of the law in depriving him of the right and benefit of showing that it was impossible for his decedent, T. A. Kramer, to make an examination into the affairs of the said Butler County State Bank during the time in question in said cause; and that the Supreme Court of the State of Kansas, erred in hold-

ing and deciding that the provisions of Section 9-163 of the Revised Statutes of the State of Kansas, which provide that if an officer or director of a bank does not examine into [fol. 490] the affairs *pf* the bank, he shall be held to have had knowledge of the condition of the bank, were not in violation of the Fourteenth Amendment to the Constitution of the United States, and did not, as interpreted by the Supreme Court of the State of Kansas, deprive said plaintiff in error of property without due process of law, when the circumstances were that, during the time in question, it was impossible for plaintiff in error's decedent, T. A. Kramer, a director in said bank, to make an examination of said bank.

VI

Plaintiff in error contends that the Supreme Court of the State of Kansas, erred in holding and deciding that the provisions of said Section 9-163 of the Revised Statutes of the state of Kansas for the year 1923, which by its terms created a conclusive presumption of knowledge against said plaintiff in error's decedent, T. A. Kramer, were not in violation of the Fourteenth Amendment to the Constitution of the United States.

VII

The plaintiff in error contends that the Supreme Court of the State of Kansas erred in holding and deciding that the provision of said section 9-164 of the Revised Statutes of the State of Kansas, which by its terms made the fact that the said banking institution was insolvent, or in failing circumstances, at the time of the reception of the deposit charged to have been received, prima facie evidence of the assent of the said plaintiff in error's decedent, T. A. Kramer, to such deposit, were not in violation of the Fourteenth Amendment to the Constitution of the United States.

VIII

Plaintiff in error contends that the Supreme Court of the State of Kansas, has erred in deciding in this cause that the provisions of said Section 9-163 of the Revised Statutes of the State of Kansas created a conclusive presumption of knowledge, and has erred in deciding in this cause that

[fol. 491] under said provisions said plaintiff in error would not be permitted to show any reason or excuse whatsoever why his decedent, T. A. Kramer, had not made an examination into the affairs of the said Butler County State Bank, and in so holding and deciding erred in holding and deciding that said statute as so interpreted was not in conflict with nor in violation of the Fourteenth Amendment to the Constitution of the United States.

IX

Plaintiff in error contends that the Supreme Court of the State of Kansas erred in holding and deciding that the fact that the plaintiff in error's decedent T. A. Kramer, was mentally and physically incapable of examining into the affairs of the said Butler County State Bank during all the time in question in this cause would not relieve said decedent from the duty of examining into the affairs of said bank during said time.

X

Plaintiff in error contends that the evidence in said cause fails to show that his decedent, T. A. Kramer, knew the said Butler County State Bank was insolvent at the time in question, and fails to show that said Butler County State Bank was insolvent at the time in question, and that the evidence in this cause fails to show that the plaintiff in error's decedent, T. A. Kramer, assented to the reception of the deposits in question, and that the evidence in this cause shows that during all the time in question plaintiff in error's decedent, T. A. Kramer, was mentally and physically unable to assent to the reception of said deposits or to examine into the affiairs of said bank, without any fault on the part of said decedent.

[fols. 492-500] XI

Said plaintiff in error further states that he thinks it necessary, for the consideration of the above points, that all the record in this case be printed.

John L. Hunt, Bruce A. Campbell, Attorneys for Plaintiff in Error.

Received a copy of the above statement this 26th day of July, 1927.

John J. Jones, Attorney for A. L. Lloyd, Defendant in Error.

[fol. 501] [File endorsement omitted.]

[fol. 502] SUPREME COURT OF THE UNITED STATES

Nos. 407 to 418, October Term, 1927

ORDER CONSOLIDATING CASES AND AS TO PRINTING—October 31, 1927

On consideration of a motion of counsel for the plaintiffs in error in these cases to consolidate them all for hearing, with directions to print the whole record in two of the cases and only so much of the record in the remaining cases as is necessary to show the difference between the cases,

It is now here ordered that the said motion be, and the same is hereby, granted, the ultimate cost of printing, of course, to await the event, and the effect of any omission to print, to be at the risk of the plaintiffs in error moving for the consolidation and the limitation of printing.

Endorsed on cover: File No. 32,869, 32,870. Kansas Supreme Court. Term No. 417. H. F. Ferry, Plaintiff in Error, vs. A. L. Lloyd, C. L. King and L. D. Hadley. Term No. 418. C. L. Harris, as executor of the last will and testament of T. A. Kramer, deceased, Plaintiff in Error, vs. A. L. Lloyd, C. L. King, H. F. Ferry, et al. Filed July 28th 1927. File No. 32,869, 32,870.

FEB 24 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1927

H. F. Ferry, Plaintiff in Error, vs. Alice M. Ramsey, et al., Defendants in Error.	Nos. 407, 409, 411, 413, 415, 417
C. L. Harris, as Executor of the Last Will and Testament of T. A. Kramer, deceased, Plaintiff in Error, vs. Alice M. Ramsey, et al., Defendants in Error.	Nos. 408, 410, 412, 414, 416, 418

BRIEF OF PLAINTIFF IN ERROR, H. F. FERRY, IN OPPOSITION TO THE MOTION TO DISMISS WRITS OF ERROR, FILED BY DEFENDANTS IN ERROR

J. B. McKAY,
L. J. BOND,
Both of El Dorado, Kansas,
Attorneys for Plaintiff in Error,
H. F. Ferry.

IN THE

Supreme Court of the United States

October Term, 1927

H. F. Ferry, Plaintiff in Error, vs. Alice M. Ramsey, C. L. King and L. D. Hadley, Defendants in Error.	No. 407
C. L. Harris, as Executor of the Last Will and Testament of T. A. Kramer, deceased, Plaintiff in Error, vs. Alice M. Ramsey, C. L. King, H. F. Ferry, et al, Defendants in Error.	No. 408
H. F. Ferry, Plaintiff in Error, vs. W. O. James, C. L. King and L. D. Hadley, Defendants in Error,	No. 409
C. L. Harris, as Executor of the Last Will and Testament of T. A. Kramer, deceased, Plaintiff in Error, vs. W. O. James, C. L. King, H. F. Ferry, et al., Defendants in Error.	No. 410
H. F. Ferry, Plaintiff in Error, vs. Ramsey Petroleum Company, C. L. King, et al., Defendants in Error.	No. 411
C. L. Harris, as Executor of the Last Will and Testament of T. A. Kramer, deceased, Plaintiff in Error, vs. Ramsey Petroleum Company, C. L. King, et al., Defendants in Error.	No. 412

H. F. Ferry, Plaintiff in Error,

vs.

G. L. Ramsey, C. L. King, et al., Defendants in Error. — No. 413

C. L. Harris, as Executor of the Last Will and Testament of T. A. Kramer, deceased, Plaintiff in Error,

vs.

G. L. Ramsey, C. L. King, H. F. Ferry, et al., Defendants in Error. — No. 414

H. F. Ferry, Plaintiff in Error,

vs.

M. R. Chastain, C. L. King, L. D. Hadley, et al., Defendants in Error. — No. 415

C. L. Harris, as Executor of the Last Will and Testament of T. A. Kramer, deceased, Plaintiff in Error,

vs.

M. R. Chastain, C. L. King, L. D. Hadley, et al., Defendants in Error. — No. 416

H. F. Ferry, Plaintiff in Error,

vs.

A. L. Lloyd, C. L. King and L. D. Hadley, Defendants in Error. — No. 417

C. L. Harris, as Executor of the Last Will and Testament of T. A. Kramer, deceased, Plaintiff in Error,

vs.

A. L. Lloyd, C. L. King and H. F. Ferry, et al, Defendants in Error. — No. 418

BRIEF OF PLAINTIFF IN ERROR, H. F. FERRY, IN OPPOSITION TO THE MOTION TO DISMISS WRITS OF ERROR, FILED BY DEFENDANTS IN ERROR.

The defendants in error, G. L. Ramsey, Ramsey Petroleum Company, a corporation, W. O. James, M. R. Chastain, Alice M. Ramsey and A. E. Lloyd, have filed herein their motion to dismiss the writs of error "or in the alternative, if dismissal is not proper, to affirm."

This plaintiff in error has already filed his brief on the merits and it is intended merely to supplement that brief by this one as to the questions raised by the motion to dismiss.

The motion to dismiss contains three grounds, the first two of which raise the point that the statutes, the constitutionality of which is challenged, are not in contravention of the Constitution of the United States, and that therefore no substantial Federal question is involved or raised. It is a sufficient answer to these two contentions to say that, as will appear from the brief already filed by this plaintiff in error on the merits, reference to which is hereby made, the Federal question presented requires analysis and exposition for its decision. "The Federal question presented, being one which requires analysis and exposition for its decision, is not frivolous and the motion to dismiss the writ of error is accordingly denied. Louisville & N. R. Co. v. Melton, 218 U. S. 36, 39; 54 L. Ed. 921; 47 L. R. A. (N. S.) 84; 30 Sup. Ct. Rep. 676." Milheim v. Moffat Tunnel Improvement Dist. (1924), 262 U. S. 710; 67 L. Ed. 1194; 43 Sup. Ct. Rep. 694.

The third ground raised by the motion to dismiss is that this court is without jurisdiction for want of necessary parties as plaintiff in error.

It is not deemed necessary to unduly extend this brief by discussing that proposition. A separate brief has been filed by plaintiff in error, C. L. Harris as executor of the estate of T. A. Kramer, deceased, reference to which is hereby made, wherein it is shown clearly that no joint judgments were rendered below against defendants below, but on the contrary separate judgments, some favorable and some unfavorable, were rendered as to each defendant. That being true, as we understand the rules, it was unnecessary for any to join with this plaintiff in error in obtaining a writ of error to this court and there is no want of necessary parties.

Respectfully submitted,

J. B. McKAY,
L. J. BOND,
Both of El Dorado, Kansas,
Attorneys for Plaintiff in Error,
H. F. Ferry.

FEB 24 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

H. F. FERRY, PLAINTIFF IN ERROR,
vs.
ALICE M. RAMSEY ET AL.,
DEFENDANTS IN ERROR.

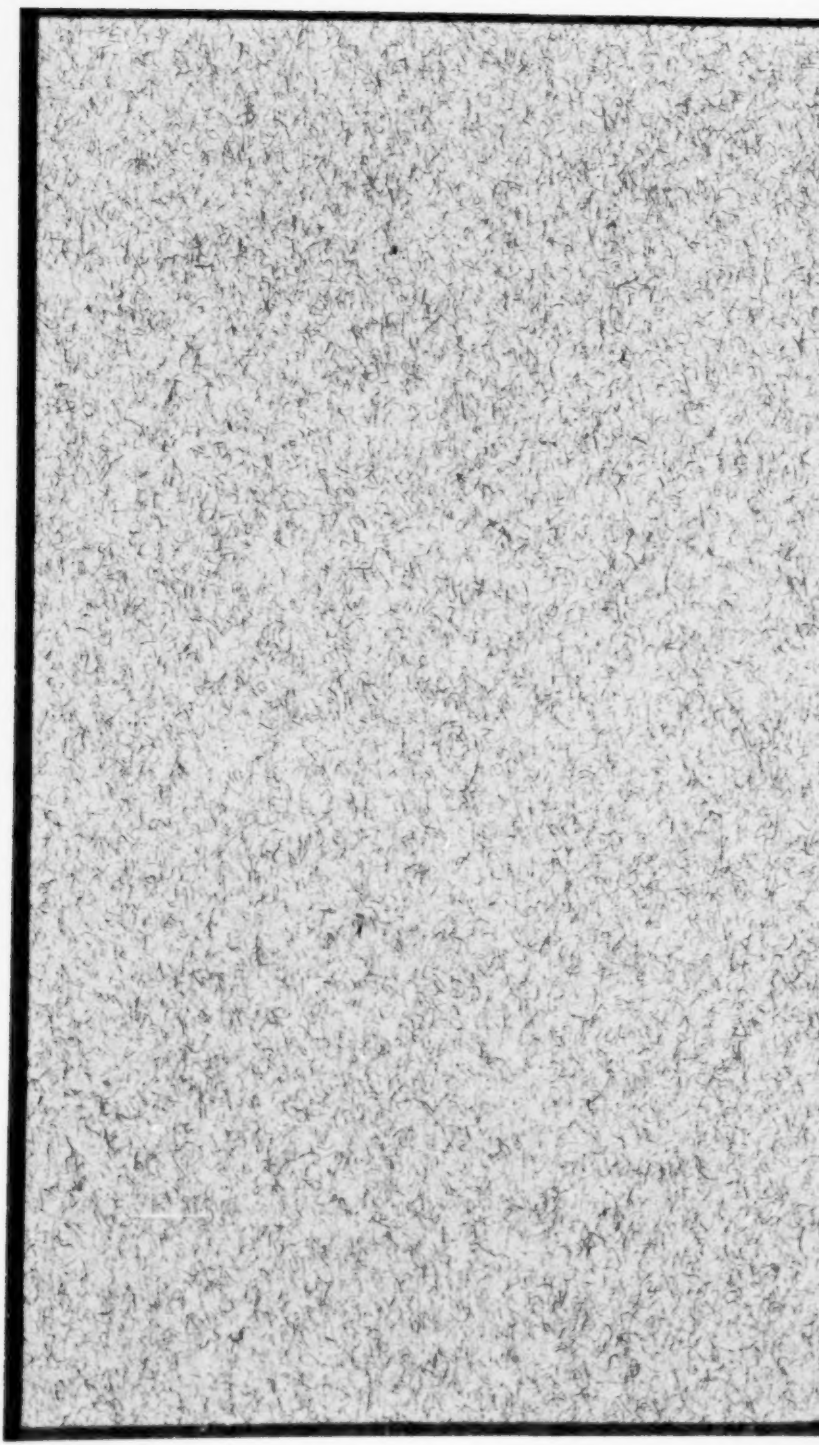
Nos. 407, 409, 411, 413, 415, 417

C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED, PLAINTIFF IN ERROR,
vs.
ALICE M. RAMSEY ET AL.,
DEFENDANTS IN ERROR.

Nos. 408, 410, 412, 414, 416, 418

BRIEF OF H. F. FERRY, PLAINTIFF IN ERROR.

J. B. McKAY,
L. J. BOND,
Both of El Dorado, Kansas,
Attorneys for Plaintiff in Error, H. F. Ferry.



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

H. F. FERRY, PLAINTIFF IN ERROR,

vs.

ALICE M. RAMSEY, C. L. KING AND L. D. HADLEY, DEFENDANTS IN ERROR.

No. 407

C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED, PLAINTIFF IN ERROR,

vs.

ALICE M. RAMSEY, C. L. KING, H. F. FERRY ET AL., DEFENDANTS IN ERROR.

No. 408

H. F. FERRY, PLAINTIFF IN ERROR,

vs.

W. O. JAMES, C. L. KING AND L. D. HADLEY, DEFENDANTS IN ERROR.

No. 409

C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED, PLAINTIFF IN ERROR,

vs.

W. O. JAMES, C. L. KING, H. F. FERRY ET AL., DEFENDANTS IN ERROR.

No. 410

H. F. FERRY, PLAINTIFF IN ERROR,

vs.

RAMSEY PETROLEUM COMPANY, C. L. KING, L. D. HADLEY ET AL., DEFENDANTS IN ERROR.

No. 411

C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED, PLAINTIFF IN ERROR,

vs.

RAMSEY PETROLEUM COMPANY, C. L. KING, L. D. HADLEY ET AL., DEFENDANTS IN ERROR.

No. 412

H. F. FERRY, PLAINTIFF IN ERROR,

vs.

G. L. RAMSEY, C. L. KING ET AL., DEFENDANTS IN ERROR.

No. 413

C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED, PLAINTIFF IN ERROR,

vs.

G. L. RAMSEY, C. L. KING, H. F. FERRY ET AL., DEFENDANTS IN ERROR.

No. 414

H. F. FERRY, PLAINTIFF IN ERROR,

vs.

M. R. CHASTAIN, C. L. KING, L. D. HADLEY ET AL., DEFENDANTS IN ERROR.

No. 415

C. L. HARRIS, as Executor of the Last Will and Testament of T. A. Kramer, Deceased, Plaintiff in Error,

vs.

M. R. CHASTAIN, C. L. KING, L. D. HADLEY ET AL., Defendants in Error.

No. 416

H. F. FERRY, Plaintiff in Error,

vs.

A. L. LLOYD, C. L. KING and L. D. HADLEY, Defendants in Error.

No. 417

C. L. HARRIS, as Executor of the Last Will and Testament of T. A. Kramer, Deceased, Plaintiff in Error.

vs.

A. L. LLOYD, C. L. KING and H. F. FERRY ET AL., Defendants in Error.

No. 418

BRIEF OF H. F. FERRY, PLAINTIFF IN ERROR.

Official Report of the Opinions Delivered in the Court Below.

G. L. Ramsey, Appellant and Cross Appellee, *v.* E. F. Adams, C. L. King, A. B. Ewing, H. F. Ferry, L. D. Hadley, C. L. Harris, Executor of the Last Will and

Testament of T. A. Kramer, deceased, Appellees and Cross Appellants.

The Ramsey Petroleum Company, Appellant, *v.* E. F. Adams *et al.*, Appellees.

The Ramsey Petroleum Company, Appellee, *v.* E. F. Adams *et al.*, Appellees (C. L. King and H. F. Ferry, Appellants).

The Ramsey Petroleum Company, Appellee, *v.* E. F. Adams *et al.* (L. D. Hadley), Appellants, 122 Kan., 675.

W. O. James, Appellant and Cross Appellee, *v.* E. F. Adams *et al.*, Appellees, and C. L. King, H. F. Ferry and L. D. Hadley, Cross Appellants.

A. E. Lloyd, Appellant and Cross Appellee, *v.* E. F. Adams *et al.*, Appellees, and C. L. King, H. F. Ferry and L. D. Hadley, Cross Appellants.

Alice M. Ramsey, Appellant and Cross Appellee, *v.* E. F. Adams *et al.*, Appellees, and C. L. King, H. F. Ferry and L. D. Hadley, Cross Appellants.

M. R. Chastain, Appellant and Cross Appellee, *v.* E. F. Adams *et al.*, Appellees, and C. L. King, H. F. Ferry and L. D. Hadley, Cross Appellants, 122 Kan., 691.

The constitutional question here presented was also presented to and determined by the Supreme Court of Kansas on a former appeal in the same cases, reported under the title of Ramsey Petroleum Company *v.* Adams, 119 Kan., 844.

Statement of the Grounds on Which the Jurisdiction of This Court is Invoked.

1. The judgment complained of was rendered against this plaintiff in error in the trial court, on

March 27, 1926 (T., 335), and said judgment was affirmed on appeal by the Supreme Court of Kansas, on February 12, 1927 (T., 348), and this plaintiff in error's petition for a rehearing was denied by said Supreme Court on April 16, 1927 (T., 369).

2. This plaintiff in error has always contended that the statutes hereinafter quoted, under which this action was prosecuted, are unconstitutional and void. This question was first raised in the trial court by a demurrer to plaintiff's petition (T., 8), which demurrer was overruled by the trial court (T., 10). The unconstitutionality of the statutes was next raised by this plaintiff in error in his separate answer (T., 17, see paragraphs 8 and 9 on pages 20 and 21). Defendant in error demurred to these paragraphs of such answer (T., 41, see paragraphs 4 and 5 on page 42), and such demurrers were sustained by the trial court (T., 43, see page 45). From this ruling of the trial court, sustaining such demurrer, this plaintiff in error prosecuted an appeal to the Supreme Court of Kansas, which court upheld the ruling of the trial court. (Ramsey Petroleum Company *v.* Adams, 119 Kan., 844, decided on December 5, 1925.) This plaintiff in error specifically raised the same points by an objection to the introduction of any testimony under the petition (T., 89 and 90), which motion was overruled by the trial court (T., 91). This plaintiff in error again specifically raised the same points by his motion for a new trial (T., 332, see paragraph 7 on page 333), which motion was overruled by the trial court (T., 335). The constitutionality of the statutes was assailed by this plaintiff in error on the appeal to the Supreme Court of

Kansas which then resulted, and that court again upheld the constitutionality of such statutes. (Ramsey *v.* Adams, 122 Kan., 675.) This plaintiff, in due time, filed in such Supreme Court his motion for a rehearing, which that Court overruled on April 16, 1927 (T., 369).

3. The jurisdiction of this Court is invoked under the provisions of Sec. 237, of the Judicial Code, paragraph A, which provides:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error * * *."

4. Cases believed to sustain the jurisdiction of this Court are:

Milheim *v.* Moffat Tunnel Improvement Dist. (1924) 262 U. S., 710; 67 L. Ed., 1194; 43 Sup. Ct. Rep., 694.

Louisville & N. R. Co. *v.* Melton, 218 U. S., 36, 39; 54 L. Ed., 921; 47 L. R. A. (N. S.), 84; 30 Sup. Ct. Rep., 676.

Schlesinger *v.* State of Wisconsin, 270 U. S., 230; 46 Sup. Ct. Rep., 260; 70 L. Ed., 301.

Wolff Packing Co. *v.* Court of Industrial Relations, 67 L. Ed., 1103.

Statement of the Case.

Six cases have been brought to this Court by this plaintiff in error against six different defendants in error. The cases are identical in all material respects, and an order was made by this Court on October 31, 1927, consolidating the cases for hearing (T., 396). To avoid useless repetition and confusion the one entitled H. F. Ferry, plaintiff in error, *v.* Alice M. Ramsey *et al.*, defendants in error, No. 407, being one of the cases in which the whole record was printed, is discussed in this brief. All that may be said respecting this case will apply with equal force to all of the others. The Court will understand that C. L. Harris, as executor of the last will and testament of T. A. Kramer, deceased, is also plaintiff in error in six cases against the same defendants in error, which have been consolidated with the six cases in which this plaintiff, H. F. Ferry, is plaintiff in error. The executor is filing a separate brief.

The amended petition on which the case was tried alleged that the defendants, including this plaintiff in error, were officers and directors of the Butler County State Bank of El Dorado, Kansas, at the time of its failure, which occurred on March 30, 1923, and that such bank was a banking corporation organized under the laws of the State of Kansas, and that the plaintiff below deposited certain sums of money in said bank at times when it was insolvent and in failing circumstances, and that defendants below, including this plaintiff in error, knew, and for more than six months

prior to such time had known, that said bank was in said condition "or by an examination into the affairs of said bank—which it was their duty to make—they could have ascertained such fact, and the plaintiff had no knowledge of the actual condition of said bank until the same was closed * * *" (T., 7) "and that such defendants, notwithstanding their knowledge and means of knowledge, assented to the bank receiving the said deposits as hereinbefore stated" (T., 7). The prayer was for the recovery of the balance remaining in such account at the date of the failure of the bank. The action was based on two statutes of the State of Kansas which are hereinafter quoted in full. From the very outset this plaintiff in error challenged the constitutionality of these statutes in the times and manner disclosed by the preceding pages of this brief. Trial was had, resulting in a judgment against this plaintiff in error and his codefendants, for the amount of such deposit with interest from the date of the failure of the bank (T., 335).

This judgment, as above stated, was affirmed by the Supreme Court of Kansas on appeal. This plaintiff in error has at all times admitted that he was an officer and director of the bank, but has at all times denied that the bank was insolvent or in failing circumstances at any of the times alleged in the amended petition, and at all times has denied that he knew said bank to have been in such insolvent or failing condition, or that by an examination into the affairs of said bank at any of said times he could have ascertained that said bank was insolvent or in failing circumstances, and denied

that he assented to the reception of any deposits knowing that the bank was insolvent or in failing circumstances (T., 18).

No effort will be made in this brief to state the facts brought out at the trial in any considerable detail, as they are not of any particular materiality in connection with the constitutional question raised by this appeal. We may say, however, that, so far as this plaintiff in error is concerned, the evidence disclosed that the bank was organized by Mr. J. B. Adams, who had charge of the note case and the making of loans up to the time of his death. Mr. Adams died about two years prior to the failure of the bank and while an examination of the bank was in progress. The bank examiner directed Mr. C. L. King, the president of the bank, to keep the bank open for business, reporting to the bank department once a month on its condition (T., 221). Mr. Ferry was not at that time an active officer of the bank, although he had been previously. In January, 1922, Mr. F. H. Foster, the then bank commissioner, called Mr. Ferry to Topeka and asked him to reenter the bank as an active officer, as the cashier of the bank was retiring. Mr. Ferry acceded to this request and became cashier in January, 1922 (T., 227). Mr. Ferry testified that, from the date he reentered the bank as its cashier, he examined into its affairs from time to time to the best of his ability, and "never entertained the idea that the bank was insolvent. I was positive at all times the bank would work out. I expected it to sustain some losses, the

principal loss to be in the Merydith line. I was positively convinced that we could work the institution out'' (T., 228). During most of the time that elapsed between the date of Mr. Adams' death and the closing of the bank Mr. F. H. Foster was bank commissioner of the State of Kansas. He testified that he kept in close touch with the affairs of the bank after Mr. Adams' death and arrived at the conclusion that the bank was not insolvent (T., 194). He was succeeded as bank commissioner by Mr. C. J. Peterson, during whose administration the bank was closed. Mr. Peterson testified that he took charge of the banking department in February, 1923, and that his predecessor, Mr. Foster, directed his attention to this bank as one to which Mr. Foster had been devoting particular attention (T., 139). That he thereupon discussed the affairs of the bank with its president, Mr. King, and told Mr. King that it was agreeable with him for the bank to be kept open. He caused his deputies to make various examinations of the bank and report to him on its condition and interviewed various interested persons, and that after receiving his confidential reports he was not convinced that the bank was insolvent (T., 140). The bank ultimately was closed, not by the bank commissioner, but by its own officers when symptoms of a run developed (T., 232).

Specification of Errors.

1.

The plaintiff in error contends that in the above entitled cause, in the trial court and in the Supreme Court

of the State of Kansas, the validity of Section 9-163 of the Revised Statutes of the State of Kansas for the year 1923, to-wit:

> "It shall be unlawful for any president, director, manager, cashier, or other officer of any banking institution, to assent to the reception of deposits or the creation of debts by such banking institution to assent to the reception knowledge of the fact that it is insolvent or in failing circumstances; and it is hereby made the duty of every such officer, agent or manager of such banking institution to examine into the affairs of the same, and, if possible, know its condition. And upon failure of any such person to discharge such duty, he shall, for the purpose of this act, be held to have had knowledge of the insolvency of such bank, or that it was in failing circumstances. Every person violating the provisions of this section shall be individually responsible for such deposits so received, and all such debts so contracted: *Provided*, Any director who may have paid more than his share of the liabilities mentioned in this section may have the proper remedy at law against such other persons as shall not have paid their full share of such liabilities."

was drawn in question by said plaintiff in error on the ground that said statute was repugnant to the Constitution of the United States, and the decision of the Supreme Court of the State of Kansas was in favor of the validity of said statute; and that in the trial court and the Supreme Court of the State of Kansas the

validity of Section 9-164, of the Revised Statutes of the State of Kansas for the year 1923, to-wit:

> "In all suits brought for the recovery of the amount of any deposits received or debt so created, all officers, agents, or managers of any such banking institutions, charged with having so assented to the reception of such deposit, or the creation of such debt, may be joined as defendants or proceeded against severally; and the fact that such banking institution was so insolvent or in failing circumstances at the time of the reception of the deposit charged to have been so received, or the creation of the debt charged to have been so created, shall be *prima facie* evidence of such knowledge and assent to such deposit or creation of such debt on the part of such officer, agent or manager so charged therewith."

was drawn in question by the plaintiff in error on the ground that the statute was repugnant to the Constitution of the United States, and the decision of the Supreme Court of the State of Kansas was in favor of the validity of said statute.

2.

Said plaintiff in error contends that the Supreme Court of the State of Kansas erred in holding and deciding that the provisions of said Section 9-163, of the Revised Statutes of the State of Kansas for the year 1923, were valid, and were not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States,

and in holding and deciding that by the provisions of said Section 9-163 of the Revised Statutes of the State of Kansas said plaintiff in error was not deprived of privileges and immunities secured to other citizens of the United States, and was not denied the equal protection of the law.

3.

Said plaintiff in error contends that the Supreme Court of the State of Kansas erred in holding and deciding that the provisions of said Section 9-164 of the Revised Statutes of the State of Kansas for the year 1923 were valid and were not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and in holding and deciding that by the provisions of said Section 9-164 of the Revised Statutes of the State of Kansas said plaintiff in error was not deprived of privileges and immunities secured to other citizens of the United States, and was deprived of property without due process of law, and was not denied the equal protection of the law.

4.

Plaintiff in error contends that the Supreme Court of the State of Kansas erred in holding and deciding that the provisions of said Section 9-163 of the Revised Statutes of the State of Kansas for the year 1923, which by its terms created a conclusive presumption of knowledge against said plaintiff in error, were not in violation of the Fourteenth Amendment to the Constitution of the United States.

5.

The plaintiff in error contends that the Supreme Court of the State of Kansas erred in holding and deciding that the provisions of said Section 9-164 of the Revised Statutes of the State of Kansas, which by its terms made the fact that the said banking institution was insolvent, or in failing circumstances at the time of the reception of the deposit charged to have been received, *prima facie* evidence of the assent of the plaintiff in error to such deposit, were not in violation of the Fourteenth Amendment to the Constitution of the United States.

6.

Plaintiff in error contends that the evidence in said cause fails to show that he knew the said Butler County State Bank was insolvent at the time in question, and fails to show that said Butler County State Bank was insolvent at the time in question, and that the evidence in this cause fails to show that the plaintiff in error assented to the reception of the deposits in question.

(T., 385, 386, 387, and 388.)

ARGUMENT.

As will have been noted from the foregoing, this appeal, so far as this plaintiff in error is concerned, raises only the question of whether or not the two sections of the statutes of Kansas, under which these actions are brought, are constitutional and valid or

unconstitutional and void. There could of course be no recovery except for the statutes. These two statutes have been quoted incidentally in the specification of errors, but for the convenience of the court they are here reproduced:

> 9-163: "It shall be unlawful for any president, director, manager, cashier, or other officer of any banking institution, to assent to the reception of deposits or the creation of debts by such banking institution, after he shall have had knowledge of the fact that it is insolvent or in failing circumstances; and it is hereby made the duty of every such officer, agent or manager of such banking institution to examine into the affairs of the same, and, if possible, know its condition. And upon failure of any such person to discharge such duty, he shall, for the purpose of this act, be held to have had knowledge of the insolvency of such bank, or that it was in failing circumstances. Every person violating the provisions of this section shall be individually responsible for such deposits so received, and all such debts so contracted: *Provided*, Any director who may have paid more than his share of the liabilities mentioned in this section may have the proper remedy at law against such other persons as shall not have paid their full share of such liabilities."
>
> 9-164: "In all suits brought for the recovery of the amount of any deposits received or debt so created, all officers, agents, or managers of any such banking institutions, charged with having so assented to the reception of such deposit, or the creation of such debt, may be joined

> as defendants or proceeded against severally; and the fact that such banking institution was so insolvent or in failing circumstances at the time of the reception of the deposit charged to have been so received, or the creation of the debt charged to have been so created, shall be *prima facie* evidence of such knowledge and assent to such deposit or creation of such debt on the part of such officer, agent or manager so charged therewith."

It is plaintiff in error's contention that Section 9-163, which makes it unlawful for an officer of a banking institution to assent to the reception of deposits after he shall have had knowledge of the fact that the bank is insolvent, creates a conclusive presumption of such knowledge of insolvency from the fact that such officer did not examine into the affairs of the bank. It will be noticed that the liability of the officer under this statute is not absolute, but only those officers are liable who assent to the reception of deposits with knowledge of the fact that the bank is insolvent. That being the case, it is our contention that the legislature could not make failure to examine, conclusive evidence of such knowledge.

With respect to the second section, being Section 9-164, it is our contention that the legislature has created a *prima facie* presumption from the fact that the bank was in failing circumstances, that the officer assented to its receiving deposits when there is no rational or logical connection between the two.

For these reasons we contend that both statutes are violative of the Fourteenth Amendment.

As stated above, this case first reached the Supreme Court of Kansas on an appeal taken by this plaintiff in error and his codefendants, from an order of the trial court sustaining a demurrer to that part of their separate answers which raised the question of the constitutionality of these statutes. The decision of such Supreme Court was in favor of the validity of the statutes and is reported under the title of Ramsey Petroleum Company *v.* Adams, 119 Kan., 844. When these cases again reached the Supreme Court of Kansas on an appeal from the final judgment against this plaintiff in error and certain of his codefendants, that court again upheld the constitutionality of such statutes and it is from that decision that this appeal is prosecuted.

Considering first Section 9-163, which, as we contend, creates a conclusive presumption of knowledge from the failure to examine, it will be noted that the statute makes only such directors liable as assent to the reception of the deposits with knowledge of the insolvency of the bank. That being true, the plaintiff in such a case is required to prove knowledge of insolvency and assent to the reception of deposits and want of knowledge, and want of assent would, therefore, be complete defenses to such an action. Want of knowledge, therefore, being a complete defense to such an action, we contend that the legislature cannot say that a bank officer is conclusively presumed to have had such knowledge by reason of his failure to have examined the bank. The natural inference to be drawn

from the fact that a person has made no investigation of a particular subject is that he knows nothing about the subject. In this instance the statute seeks to reverse the natural order of things by creating a conclusive presumption that an officer who makes no examination of the bank knows that it is insolvent, if such be the case. The statute gives the officer no opportunity to show that he had no reasonable opportunity to make an investigation and the Supreme Court of Kansas in construing the statute has held that when no examination is made, it is immaterial that such examination if made would have been futile.

> "The contention of the plaintiffs in error, put into as narrow a compass as possible, is that the proper interpretation of these sections is that it is the duty of a director to examine into the affairs of the bank, and if he fail to do so he shall be held to have knowledge of the bank's insolvency, and consequently be liable to a depositor if by such examination it would have been possible for him to ascertain the condition of the bank. We are unable to agree with them in this construction. * * * An examination by the officer is required, regardless of what it may show. * * * A director may not excuse himself from liability to a depositor by saying * * * that it would have been useless for him to make such examination because the speculations of the cashier were of such character, and carried on and concealed with so skilful a hand, that he, not being an expert, could not have discovered them. * * * In short, the requirement of the statute is that the

examination be made, and be of such character as would result in a knowledge of the condition of the bank if such knowledge could possibly, within the range of reasonable frequency and thoroughness, be obtained.

"We do not think that the plea of a director sought to be charged with liability under the quoted statutes, that he made no examination, but that if he had, it would not have been possible for him to ascertain the failing condition of the bank, is sufficient to excuse him from the liability imposed by law."

Forbes *v.* Mohr, 69 Kan., 342.

Want of knowledge being a defense, we contend that the defendant in an action of this kind has the right to prove want of knowledge, and the effect of the statute creating against the officer a conclusive presumption of knowledge is to deprive the officer of property without due process of law. The controlling general principles are well stated in 12 C. J., page 1233, where it is said:

"Evidence. The legislature in its discretion may, without denial of due process of law, prescribe changes in the rules of evidence for the trial of civil cases, and may make such changes applicable to existing causes of action, past transactions, and even to pending cases, subject in all cases, however, to the limitations that it may not preclude a party from presenting the facts supporting his theory of the case. It may, for example, create presumptions, regulate the burden of proof and the admissibility of evidence, and may provide that official cer-

tificates, records, or orders, and other writings, shall constitute *prima facie* evidence of the facts stated therein, and, in general, that proof of certain facts shall constitute *prima facie* evidence of other facts with which they have a rational connection. The legislature may not, however, arbitrarily provide that proof of one fact shall constitute even *prima facie* evidence of another fact that it has no reasonable tendency to establish. And statutes making written instruments conclusive evidence of facts stated therein, or making proof of certain fact conclusive evidence of other facts, operate to deny a hearing on the facts in issue, and thus violate the guaranties of due process of law. An apparent, but not real, exception to this latter rule is that statements made by a party in a written instrument, such as a warehouse receipt, or an insurance policy, may be conclusive against the party making such statements, on the ground of estoppel."

The same principles are stated in 6 R. C. L., 462, as follows:

"General Principles. The legislature has power to establish rules of evidence, where not in conflict with the Constitution or rights guaranteed by it. And under this power it may declare that a fact shall be *prima facie* evidence of another fact which it has a tendency to prove. The fact on which a presumption is to rest must have some fair relation to, or some natural connection with, the fact to be proved, and the existence of the established fact must reasonably tend to raise an inference of the main fact.

> There are fixed bounds to the power of the legislature over the subject of evidence which must not be exceeded. As to what shall be evidence, and who shall assume the burden of proof, its power is unrestricted so long as its rules are impartial and uniform; but it has no power to establish rules which, under pretense of regulating evidence, altogether prohibit a party from exhibiting his rights, since this would substantially deprive him of due process of law. A conclusive presumption cannot be established which would overrule the essential facts and thereby preclude a party from asserting the truth."

The Supreme Court of Kansas has recognized and applied these principles. We quote from Railway Company *v.* Simonson, 64 Kan., 802:

> "The theory on which all these cases proceed is that an act of the legislature which undertakes to make a particular fact or matter in evidence involving the substantive right of the case conclusive upon the parties, and which precludes inquiry into the meritorious issues of the controversy, is an invasion of the judicial province and a denial of due process of law. The legislature may regulate the form and the manner of use of the instruments of evidence—the media of proof—but it cannot preclude a party wholly from making his proof. A statute which declares what shall be taken as conclusive evidence of a fact is one which, of course, precludes investigation into the fact, and itself determines the matter in advance of all judicial inquiry. If such statutes can be upheld

there is then little use for courts, and small room indeed for the exercise of their functions."

The following quotations are taken from Petersilie *v.* McLachlin, 80 Kan., 176:

"It is everywhere conceded that the legislature may declare that a record or an instrument or a copy thereof or a fact proved shall be presumptive or *prima facie* evidence of the existence of some other fact, but where it attempts to make these evidential things conclusive it passes the bounds of legislative power and invades the province of the courts, and, in the language of the court in Railway Co. *v.* Simonson, *supra*, 'precludes investigation into the fact, and itself determines the matter in advance of all judicial inquiry' (Page 808). The legislature, in Section 3, attempted to interfere with the power of the courts and to forbid the investigation of facts by a declaration that certain testimony or other evidential data shall be conclusive, and this is beyond the province of the legislature. The holder of the first certificate is thus deprived of the right to prove the actual facts as they exist, and his property is transferred by a legislative act to another. That this is not due process of law is so clear as not to require argument. In Felix *v.* Wallace County, *supra*, Mr. Justice Smith, speaking for the Court, said:

"'The legislature can not be allowed to thrust its arbitrary declarations into such adversary proceedings and decide which party would prevail. It is without power to substitute its judgment in a disputed matter for that of a court, en-

> gaged in the work of administering justice by orderly methods, after discovering the truth by hearing evidence on both sides admitted according to legal rules' (Page 838).

"In the seventh edition of Cooley's Constitutional Limitations, at page 526, the author says:

> "'But there are fixed bounds to the power of the legislature over this subject which can not be exceeded, * * * but it has no power to establish rules which, under pretense of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights. * * * In judicial investigations the law of the land requires an opportunity for a trial; and there can be no trial if only one party is suffered to produce his proofs.'"

To the same effect are the decisions of this Court in McFarland *v.* American Sugar Refining Company, 241 U. S., 79; 60 L. Ed., 899, it was said:

> "As to the presumptions, of course, the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.'
>
> "Mobile J. & K. C. R. Co. *v.* Turnipseed, 219 U. S., 35, 43; 55 L. Ed., 78, 80; 32

L. R. A. (n. s.), 226; 31 Sup. Ct. Rep., 136; Ann. Cas., 1912, A., 463; 2 N. C. C. A., 243."

These authorities and many more, some of which will be hereafter noted, were cited in the first appeal to the Supreme Court of Kansas, and concerning them that court said:

> "Is this imposition of liability for negligence and official delinquency at odds with the fourteenth amendment? Defendants so contend; they cite texts and authorities, including our own cases, like Railway Company *v.* Simonson, 64 Kan., 802; 70 Pac., 881, and Petersilie *v.* McLachlin, 80 Kan., 176; 101 Pac., 1014, to the effect that due process of law is denied by a statutory declaration that such and such facts shall be conclusive proof of something required to be established in a judicial proceeding when such facts are not of such inherently probative character. With this general doctrine of the cases relied on there need be no quarrel; certainly this Court has no disposition to disturb legal principles of such fundamental worth. (12 C. J., 1233-1234; 6 R. C. L., 462; 2 Wigmore on Evidence, 2d ed., 1016 *et seq.*) But we cannot agree that the statutory provision under present scrutiny is justly subject to the criticism leveled against it. The provision reads: 'And upon failure of any such person (officer or director) to discharge such duty (to examine the bank) he shall, for the purpose of this act, be held to have had knowledge of the insolvency of such bank, or that it was in failing circumstances.' This is not an arbitrary edict of the

legislature making evidence out of facts which are without inherent evidential significance, nor an arbitrary perversion of the rules of evidence. It is rather a statutory declaration of substantive law. We have many such rules of substantive law touching civil liability. Analogous liabilities are imposed by substantive law, even where there is little or no element of actual wrongdoing or negligence on the part of those subjected thereto. Such is the plight of stockholders of an insolvent bank. So, too, a business partner is liable as a matter of law for many acts and delicts of his copartner or of his servant, although such acts or delicts may have been committed without his knowledge or assent, and even in violation of his wishes and instructions. Nothing is more common than the imposition of liability upon a principal for the acts, contracts or torts of his agent when done under color of his agency, although the principal may have been in no sense morally culpable for such acts."

The only authorities which the Kansas court cited in support of its position were 2 Wigmore on Evidence, 2d ed., 1055, and Orient Insurance Co. *v.* Daggs, 172 U. S., 557; 43 L. Ed., 552. An examination of the quotation from Wigmore discloses that the author does not cite a single case to support the text. Contrary to Professor Wigmore's contention it is said in 12 C. J., 1234, notes 93, 94 and 95:

"And statutes making written instruments conclusive evidence of facts stated therein, or

> making proof of certain facts conclusive evidence of other facts, operate to deny hearing on the facts in issue, and thus violate the guaranties of due process of law."

Numerous cases are cited in *Corpus Juris* to sustain this quotation. Neither does the case of Orient Insurance Co. *v.* Daggs sustain the position of the Kansas court. The statute invoked in that case changed policies of insurance from open policies to valued policies. It permitted the parties to fix their own valuation but it did not make that valuation conclusive on all points. The following excerpts from the opinion of this Court show that that case is not applicable to this situation:

> "The statute, then, does not present the alternative of wager policies to indemnity policies. The change is from one kind of indemnity policy to another kind—from open policies to valued policies—both of which are sanctioned by the practice and law of insurance and this change is the only compulsion of the law. It makes no contract for the parties. In this it permits absolute freedom. It leaves them to fix the valuation of the property upon such prudence and inquiry as they choose. It only ascribes estoppel after this is done—estoppel, it must be observed, to the acts of the parties, and only to their acts, in open and honest dealing. Its presumptions cannot be urged against fraud, and it permits the subsequent depreciation of the property to be shown. * * *
>
> "The cases cited by plaintiff in error, which hold that the legislature may give the effect of

> *prima facie* proof to certain acts, but not conclusive proof, do not apply. They were not of contract nor gave effect to contracts. It is one thing to attribute effect to the convention of parties entered into under the admonition of the law, and another thing to give to circumstances, maybe accidental, conclusive presumption and proof to establish and force a result against property or liberty."

This case is analyzed and distinguished in Shellebarger Elevator Co. *v.* Ill. C. R. Co., in L. R. A. 1917E, pages 1016 and 1017.

Similarly the Kansas statute under consideration does not relate to any matter concerning which the directors and depositors have entered into a contract. It is a statute imposing liability upon the directors for accepting deposits after knowledge that the bank is insolvent. The statute attempts to establish rules of evidence under which the depositor may prove his case against the directors and does not enact a rule of substantive law. To give the statute the effect which the Kansas court announces in the first case, the statute would have to read that every director shall be liable to depositors if he fails to make an examination of the bank. The statute does not so provide and cannot be so construed. The liability is based upon assent after knowledge of insolvency and the conclusive presumption raised is a method provided for proving insolvency. Conceding for the moment the power of the legislature to establish a rule of absolute liability upon the part of a director who failed to examine, it is plain

that the legislature had no intention of so doing. What the legislature did intend to do was to make it easier for the depositor to prove his case.

In Ashley *v.* Frame, 4 K. A., 265, it was held that this statute imposed a penalty on the director for his failure to do a duty, but this case was overruled in Frame *v.* Ashley, 59 Kan., 477, in which the Supreme Court held that the action is upon a "liability created by statute" and not, as was held by the court of appeals, "upon a statute for penalty or forfeiture."

After the preliminary decision referred to in 119 Kan., and before the last decision was announced in 122 Kan., the Supreme Court of the United States decided the case of Schlesinger *v.* State of Wisconsin, 270 U. S., 230; 46 Sup. Ct. Rep., 260; 70 L. Ed., 301, which was cited to the Supreme Court of Kansas on the second appeal to it, being the one now under consideration. Concerning that decision the Kansas court said:

> "A contention that the statute is analogous to a Wisconsin statute considered by the Supreme Court of the United States in Schlesinger v. State of Wisconsin, 270 U. S. 230; 46 Supt. Ct. Rep. 260; 70 L. Ed. 301, may be briefly noticed. The statute of Wisconsin to which reference is made provided that any transfer of any substantial part of a grantor's property within six years prior to his death without an adequate consideration should be construed to have been made in contemplation of death and subject to the inheritance tax. In the Schlesinger case the decedent made a transfer of some five million

dollars of his property, or substantially all of his estate, to relatives within from two to four years of his death. A tax was imposed upon his estate upon these gifts. The lower court found that actually the testator did not make the transfers in contemplation of death, but that the statute raised a conclusive presumption that he did. On appeal the case was affirmed by the Supreme Court of Wisconsin, but was reversed by the Supreme Court of the United States. In the opinion by the latter, it was said:

" 'The challenged enactment plainly undertakes to raise a conclusive presumption that all material gifts within six years of death were made in anticipation of it and to lay a graduated inheritance tax upon them without regard to the actual intent. The presumption is declared to be conclusive and cannot be overcome by evidence. It is no mere *prima facie* presumption of fact.'

"The Wisconsin statute is not analogous to ours. Ours does not undertake to raise a conclusive presumption as does the Wisconsin statute. The Wisconsin statute provides no escape from its provisions; ours does. Ours provides a mere *prima facie* presumption of fact which may be overcome by a showing on the part of the director of having examined into the affairs of the bank to know if possible its condition or some other *bona fide* reason that he (the director) was physically or otherwise unable to know its condition. The other provision of our statute which holds the director to have knowledge of the bank's condition because of his failure to discharge his duties is a declaration of substantive law, *i. e.*, it creates an obliga-

tion on the part of the director to do certain things which if done will relieve him of liability to the depositor. It also gives the depositor a right to recover from him if he fails in this regard to do his duty."

"We conclude that the Schlesinger case is not controlling here and adhere to our former decision that the statute under consideration does not deprive the defendants of property without due process of law."

122 Kan., 677, 678, 679.

The Supreme Court of Wisconsin in upholding the validity of the statute said:

"The legislature does not say that a gift not made in contemplation of death is actually made in contemplation of death. What it says is that, if the gift is made within six years of the donor's death, it shall for taxation purposes be construed to fall within the class of gifts made in contemplation of death. The law is quite full of instances where, on grounds of public policy, so as to effectively administer a law, a certain definite and fixed legal import is given to facts, though the actual facts may be different. Thus dividends declared by a going corporation are conclusively declared to be made out of profits for income tax purposes, though the actual facts may be quite the contrary. Van Dyke *v.* Milwaukee, 159 Wis. 460, 146 N. W. 812, 150 N. W. 509; State *ex rel.* Pfister *v.* Widule, 166 Wis. 48, 163 N. W. 641; Pfister Land Co. *v.* Milwaukee, 166 Wis. 223, 165 N. W. 23; State *ex rel.* Sallie F. Moon Ci *v.* Wis. Tax. Comm., 166 Wis. 287, 163 N. W. 639, 165 N. W. 470. So insurance

payable upon the death of a person shall be deemed a part of his estate for the purpose of the tax, though the deceased may not have paid a single premium upon the insurance. Upon the death of a joint tenant of property, one-half shall be deemed taxable to the estate, though the interests may be different. Such provisions are made in order that the administration of tax laws may not be made too cumbersome, expensive, and uncertain, and to avoid escape from taxation. If A conveys his property to B to avoid his creditors, though upon the express promise that he will upon demand reconvey, the statute steps in and says on grounds of public policy that the promise cannot be enforced. The chapter on real property is full of instances where the Legislature gives a conclusive construction to the title grant or relation of the parties, when certain facts appear or certain language is used, irrespective of what the particular parties meant."

but in disposing of these contentions this Court said:

"No question is made of the state's power to tax gifts actually made in anticipation of death, as though the property passed by will or descent; nor is there denial of the power of the State to tax gifts *inter vivos* when not arbitrarily exerted.

"The challenged enactment plainly undertakes to raise a conclusive presumption that all material gifts within six years of death were made in anticipation of it and to lay a graduated inheritance tax upon them without regard to the actual intent. The presumption is declared to to be conclusive and cannot be overcome by evi-

dence. It is no mere *prima facie* presumption of fact.

"(1) The court below declared that a tax on gifts *inter vivos* only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary.' We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth Amendment. The legislative action here challenged is no less arbitrary. Gifts *inter vivos* within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, while like gifts at other times are not thus treated. There is no adequate basis for this distinction. Secondly, they are subjected to graduated taxes which could not properly be laid on all gifts or, indeed, upon any gift without testamentary character.

"(2) The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the Legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, A may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against B. Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever.

"(3) No new doctrine was announced in Stebbins *v.* Riley, 45 S. Ct., 424; 268 U. S., 137; 69

L. Ed., 884, cited by defendant in error. A classification for purposes of taxation must rest on some reasonable distinction. A forbidden tax cannot be enforced in order to facilitate the collection of one properly laid. Mobile, etc., R. R. *v.* Turnipseed, 31 S. Ct., 136; 219 U. S., 35, 43; 55 L. Ed., 78; 32 L. R. A. (N. S.), 226; Ann. Cas., 1912A, 463, discusses the doctrine of presumption.

"The judgment of the court below must be reversed. The cause will be remanded for further proceedings not inconsistent with this opinion."

In the Wisconsin case the tax was dependent upon the mental condition of the grantor; that is, whether or not he was making the transfer in contemplation of death. This tax was assessed if the transfer was actually made in contemplation of death, regardless of the time when it was made. But in order to fix a rule of liability the statute there prescribed that one making a transfer within six years of his death should be presumed to have had a mental attitude which he did not have; that is, he was presumed to have made a transfer in contemplation of death, regardless of whether or not he had such intention.

Here, the liability is fixed upon a director who assented to reception of deposits after knowledge of insolvency. The liability depends upon a mental condition, to wit, knowledge. For the purpose of making the act more readily enforceable, however, the legislature has prescribed that under certain conditions

that mental condition (knowledge) will be conclusively presumed, regardless of whether it existed or not. The two cases are identical.

It is to be noted that the Supreme Court of the United States in the above case said that the legislature cannot make those things actualities which are not. And the legislature cannot impose upon a director liability on the ground that he would have had knowledge of the true condition of the bank had he made an examination, when the fact is such examination would not have disclosed the condition of the bank.

Even viewed as a rule of substantive law, the statute would be unconstitutional for another reason. As stated above, it was held in the case of Frame *v.* Ashley, 59 Kan., 477, that such an action is upon a liability created by statute. If the statute be treated as a rule of substantive law, it at the most imposes a civil liability to compensate the depositors for loss resulting from the failure of the director to perform the duty imposed by the statute, to examine the bank. Such a statute would be unconstitutional because of being unreasonable and arbitrary in placing such a liability upon the directors without regard to whether such neglect of duty to examine occasioned the loss or not. The Kansas court says that directors shall be liable if they have failed to examine into the affairs of the bank, no matter if such examination would have been futile. Forbes *v.* Mohr, 69 Kan., 342. In other words, the Kansas court has construed the statute to impose an absolute liability upon failure to examine, regard-

less of what an examination would have disclosed, and regardless of whether the failure to examine was the proximate cause of the loss. If an examination into the affairs of the bank would not have shown its true condition, then to award compensatory damages to the depositors because of the failure to examine is to take the property of the directors without due process of law, because their neglect had no causal relation to the injury. This rule is well stated in 29 Cyc., 439, where it is said:

> "Although the violation of a statute is held to be negligence *per se*, there must be a causal relation between such act and the injury to render defendant liable, and such violation must be the proximate cause of the injury. And in this respect it must appear that compliance with the ordinance would have prevented the injury."

Numerous cases are cited in support of this text (Notes 74, 75 and 76), including Hodgson *v.* Dexter, 12 Fed. Cas., 6565; 1 Cranch, C. C., 109, affirmed; 1 Cranch, 345; 2 L. Ed., 130.

Reverting to the last decision of the Kansas court, it will be noted that the majority opinion sought to draw distinction between the statutes under consideration and the Wisconsin statute involved in the Schlesinger case. The court said that the Wisconsin statute raised a conclusive presumption, while the Kansas statute provides "a mere *prima facie* presumption of fact which may be overcome by a showing on the part of the director of having examined into the affairs of the bank to know, if possible, its condition or some

other bona fide reason that he (the director) was physically or otherwise unable to know its condition." The quoted statement from the opinion does not meet the case. The statute very positively creates not a "mere *prima facie* presumption," but a conclusive presumption against a director who does not examine. Further, the opinion of the Kansas court is not consistent. The sentence following the one quoted says: "The other provision of our statute which holds a director to have knowledge of the bank's condition because of his failure to discharge his duties, is a declaration of substantive law, *i. e.*, it creates an obligation on the part of the director to do certain things, which, if done, will relieve him of liability to the depositor. It also gives the depositor a right to recover from him if he fails in this regard to do his duty." What "other provision" of the statute the court had in mind we are unable to state. The only provision to which the court could have referred when it said a *prima facie* presumption was created and the only one it could have meant which it says is a declaration of substantive law, is "and upon failure of any such person to discharge such duty, he shall, for the purpose of this act, be held to have had knowledge of the insolvency of such bank * * *." In other words, the Kansas court analyzes this statute and says in the first sentence that it creates a *prima facie* presumption of fact and in the next sentence that it is a declaration of substantive law. As a matter of fact it is neither, but creates a conclusive presumption.

It should be noted that the last decision of the Kansas court was a four to three decision. Justice Burch

dissented generally so far as indicated. Justice Harvey concurred specially, basing his concurrence upon the view that there is no legal excuse available to a director who does not examine, and that such a director is under the statute conclusively held to know the condition of the bank. Under this view of the statute the majority of the Kansas court seems to concede that it would be unconstitutional. Justice Dawson dissented, saying in part: "This Court makes a clear distinction between the present cases and the Schlesinger case, *supra*. * * * And since we must or do concede that the constitutionality of our statute is dependent upon its being given an interpretation which will fairly justify a distinction between the liability imposed on a bank director under the Kansas statute and such a liability as was sought to be imposed by the Wisconsin statute in the Schlesinger case, it will not do to impose a liability on Kramer's estate regardless of the jury's verdict. The court's decision should be consistent with itself. To avoid running afoul of the Federal Constitution, we interpret our statute as not precluding a judicial inquiry touching Kramer's physical condition so as to determine his culpability and the possible liability of his estate; but in doing so we collide with a fundamental principle of appellate review by substituting our judgment for that of the jury and the trial court on the well-defined and conceded issue of fact." As we interpret Justice Dawson's dissenting opinion, he is of the view that the statute as interpreted and applied against Kramer's executor is unconstitutional. We are not going into this phase of the mat-

ter at length because we apprehend that it will be dealt on in the executor's brief to be filed herein.

Section 9-164.

Section 9-164 is, we contend, also violative of the 14th Amendment, but for a somewhat different reason. That section, so far as now material, provides that the fact that the banking institution was insolvent at the time of the reception of the deposit shall be *prima facie* evidence of the fact that the directors assented to the reception of such deposit. It is the rule as stated in many of the authorities quoted above, which it is not necessary to repeat here, that even a *prima facie* presumption cannot be created where there is no rational or logical connection between the fact upon which the presumption is to rest and the fact to be proved. The existence of the established fact must reasonably tend to raise an inference of the main fact. Now how can it be said that the fact that a bank is insolvent, reasonably tends to raise an inference that its officers assented to its receiving deposits? Ordinarily courts do not assume that persons intend to violate the law. In the preliminary appeal to it the Supreme Court of Kansas said concerning this statute:

> "It is argued that there is not a sufficiently fair relation or connection between such evidential facts as declared by the statute and the main ultimate fact to be judicially ascertained—whether the officer, agent or manager actually did know of the bank's financial unsoundness. We cannot agree to this contention. We think the matters, declared in this statute to be *prima*

facie evidence of the ultimate fact, have inherently probative significance of a highly potent character."

119 Kan., 852.

The statement does not meet the point. The court says that there is a fair relation between the evidential facts as declared by the statute and the ultimate fact to be ascertained, whether the officer knew of the bank's condition. The question is whether there is a fair relation between the fact that the bank was insolvent and the fact presumed therefrom, that its officers assented to its receiving such deposits. In other words, under the statute a plaintiff is required only to prove that the bank was insolvent and there then arises a *prima facie* presumption that a director, who in fact may have been thousands of miles away at the time, assented to its receiving plaintiff's deposit. The situation is worse than that. Under Sec. 9-163, plaintiff, upon proof that an officer was absent and consequently made no examination of the bank, creates a conclusive presumption that such absent officer knew the bank to be insolvent, and from the fact that the bank was insolvent, Sec. 9-164, created a *prima facie* presumption that he assented to the reception of deposits, so that the only evidential fact the plaintiff would be required to prove would be the absence of the director and the presumptions created by the statute would complete the plaintiff's case. As to *prima facie* presumptions, and in addition to the authorities already quoted, it is only necessary to quote from the opinion of this Court in McFarland *v.* American Sugar

Refining Co., 241 U. S., 79; 60 L. Ed., 899, where it is said:

> "As to the presumptions, of course, the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."

It should also be noted that Section 9-164 attempts to create a presumption based on a presumption.

R. S., 9-163, fixes the liability upon assent to the reception of deposits after knowledge of insolvency. It therefore appears that knowledge is a prerequisite to assent. There can be no assent until there is knowledge. Not only does this statute recognize this fact, but all definitions of the word "assent" lead to the same conclusion.

5 C. J., 811, note (*a*) defines "Assent" as follows:

> "Assent is an act of the mind; that intelligent power in man by which he conceives, reasons and judges, and of which it is a primary, invariable and most familiar law that it cannot act with reference to external objects, until, through the medium of the senses, it is impressed with or knows their existence. Hence, without such impression or knowledge, there can be no assent, no *actus contra actum;* and to presume it, in opposition to the facts, is to presume that which is impossible; which the law,

the rules and precepts of which are in conformity with the unchanging truths of nature, will never do." Welch *v.* Sackett, 12 Wis., 243, 257.

(2) "Assent is primarily an act of the understanding * * *. It presupposes that the person to be affected has knowledge of his rights." Jewell *v.* Jewell, 84 Me., 304, 307; 24 A., 858; 18 L. R. A. (quot. Hanscom *v.* Home Ins. Co., 90 Me., 333,339; 38 A., 324).

(*d*) "Mere negligence insufficient. To constitute assent, there must be something more than mere negligence on the part of a director of a corporation in not knowing what, in the exercise of proper care, he ought to have known. There must be some willful or intentional violation of duty—an assenting to an act, knowing that it is being or is about to be done. Patterson *v.* Stewart, 41 Minn., 84, 94; 42 N. W., 926; 16 Am. S. R., 671; 4 L. R. A., 745."

It follows from these decisions, as well as from the very words of the statute, that assent is based in part upon the previous condition of knowledge.

The statute here provides that proof of insolvency shall constitute *prima facie* evidence not only of knowledge, but of assent. Therefore, inasmuch as assent is based in part upon knowledge, the statute provides for a presumption upon a presumption.

In 22 C. J., page 84, it is said:

"An inference of fact should not be drawn from premises which are uncertain, but the

> facts upon which an inference may legitimately rest must, it is said, be established by direct evidence as if they were the very facts in issue. It follows that one presumption cannot be based on another presumption."

The latter part of the syllabus in Railroad Co. *v.* Baumgartner, 74 Kan., 148, says:

> "One presumption of fact cannot, in law, become the basis of another presumption of fact."

In U. S. *v.* Ross, 92 U. S., 281, the court, in speaking of the mode of reasoning by which a conclusion is sought to be arrived at by basing one presumption on another, said:

> "They are inferences from inferences: presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed. * * * The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences * * *. A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption."

In Manning *v.* John Hancock Mut. L. Ins. Co., 100 U. S., 693, the court said:

> "We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact which the law recognizes are immediate inferences from facts proved."

In 10 Ann. Cas., page 1097, under the heading "Application of Rule," are found many instances where it has been held that one presumption cannot be based upon another.

The case of Cunard Steamship Co. *v.* Kelley, 126 Fed., 610; 61 C. C. A., 533, affords an analogous instance to the present case. There it was held that a presumption that a certain person must have seen marks upon certain goods could not be based upon the presumption that his duty required him to observe such marks. The reason of the decision was that it called for a presumption upon a presumption. So here it cannot be presumed that the directors assented to the reception of deposits merely because it was their duty to examine into the affairs of the bank.

In 10 R. C. L., 870, it is said:

> "It is a well-established rule that a presumption can be legally indulged only when the facts from which the presumption arises are proved

> by direct evidence, and that one presumption cannot be deduced from another. To hold that a fact inferred or presumed at once becomes an established fact, for the purpose of serving as a base for a further inference or presumption, would be to spin out the chain of presumptions into the regions of the barest conjecture."

In Manning *v.* John Hancock Mut. L. Ins. Co., 100 U. S., 693, *supra,* it was held that a presumption that insurance premiums had been paid over by insurance agents to the company could not be based on presumptions that the premiums were paid to the agents. It was also held that the latter presumption could not be based on a presumption that certain policies which had been in force did not lapse, but were renewed.

The rule has been sanctioned in Kansas in Duncan *v.* Railroad, 82 Kan., 230, l. c., 233, where the court said:

> "It has been said that one presumption of fact cannot in law become the basis of another presumption of fact."

Assent as specified in the statute can only be given after knowledge. The very idea conveyed by the word "assent" includes knowledge. One cannot assent to that of which he has no knowledge. Hence assent is based upon knowledge. To provide that knowledge and assent is to be presumed from insolvency is to say that proof of insolvency presumes knowledge and from this presumption of knowledge, assent is presumed. This cannot be legally done. Hence so far as R. S. 9-164 attempts to make proof of assent dependent upon

proof of insolvency, the statute is unconstitutional and void and violates the due process clause of the Federal Constitution.

In Simpkins *v.* State, 249 Pac., 168 (Okla.), it was held that a statute which provided that the having of intoxicating liquor in possession by the driver of an automobile is *prima facie* evidence of a violation of the act prohibiting the driving of an automobile while intoxicated, was unconstitutional, as basing a presumption upon a presumption, that is, from the fact that defendant had liquor in his possession, it was presumed that he had partaken of it and upon that presumption it was presumed that he had become intoxicated. This decision was based in part upon the authority of U. S. *v.* Ross, 92 U. S., 281.

We submit under the authorities cited, no legislature can create a conclusive presumption of liability or a conclusive presumption of evidence and make that thing true which is not true. Every person has a constitutional right to present his defense to every material issue in the case. A material issue in such a case as this is whether a director had knowledge of the insolvency of his bank. A statute that creates a conclusive presumption of such knowledge against him, deprives him of his right to present his defense. Another material issue is whether he assented to the bank receiving deposits and the creation against him of *prima facie* presumption that he did so assent because the bank was insolvent is likewise to deprive him of his property without due process of law.

We respectfully submit that each of these sections of the statute should be declared unconstitutional and that the judgments of the Supreme Court of Kansas in all of the consolidated cases should be reversed, with directions to render judgment for this plaintiff in error.

Respectfully submitted,

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FILED
FEB 23 1928
CHARLES ELMORE CROPL
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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

H. F. FERRY,
Plaintiff in Error,
vs.
ALICE M. RAMSEY et al.,
Defendants in Error,
No. 407.

C. L. HARRIS, as Executor of the Last Will and Testament of T. A. KRAMER, Deceased,
Plaintiff in Error,
vs.
ALICE M. RAMSEY, C. L. KING, H. F. FERRY and L. D. HADLEY,
Defendants in Error.
No. 408.

And Nos. 409, 410, 411, 412, 413, 414, 415, 416, 417 and 418, Consolidated for Hearing.

In Error to the Supreme Court of the State of Kansas.

BRIEF OF C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED, ON MOTION TO DISMISS OR AFFIRM.

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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1927.

H. F. FERRY,
Plaintiff in Error,
vs.
ALICE M. RAMSEY et al.,
Defendants in Error.

No. 407.

C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED,
Plaintiff in Error,
vs.
ALICE M. RAMSEY, C. L. KING, H. F. FERRY and L. D. HADLEY,
Defendants in Error.

No. 408.

H. F. FERRY,
Plaintiff in Error,
vs.
W. O. JAMES, C. L. KING and L. D. HADLEY,
Defendants in Error.

No. 409.

C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED,
Plaintiff in Error,
vs.
W. O. JAMES, C. L. KING, H. F. FERRY and L. D. HADLEY,
Defendants in Error.

No. 410.

H. F. FERRY,
Plaintiff in Error,
vs.
RAMSEY PETROLEUM COMPANY, C. L. KING, L. D. HADLEY et al.,
Defendants in Error.
No. 411.

C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED,
Plaintiff in Error,
vs.
RAMSEY PETROLEUM COMPANY, C. L. KING, H. F. FERRY and L. D. HADLEY,
Defendants in Error.
No. 412.

H. F. FERRY,
Plaintiff in Error,
vs.
G. L. RAMSEY, C. L. KING et al.,
Defendants in Error.
No. 413.

C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED,
Plaintiff in Error,
vs.
G. L. RAMSEY, C. L. KING, H. F. FERRY and L. D. HADLEY,
Defendants in Error.
No. 414.

H. F. FERRY,
Plaintiff in Error,
vs.
M. R. CHASTAIN, C. L. KING, L. D. HADLEY et al.,
Defendants in Error.
No. 415.

C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED,
Plaintiff in Error,
vs.
M. R. CHASTAIN, C. L. KING, H. F. FERRY and L. D. HADLEY,
Defendants in Error.
No. 416.

H. F. FERRY,
Plaintiff in Error,
vs.
A. E. LLOYD, C. L. KING and L. D. HADLEY,
Defendants in Error.
No. 417.

C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED,
Plaintiff in Error,
vs.
A. E. LLOYD, C. L. KING, H. F. FERRY and L. D. HADLEY,
Defendants in Error.
No. 418.

In Error to the Supreme Court of the State of Kansas.

BRIEF OF C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED, ON MOTION TO DISMISS OR AFFIRM.

The opinion of the Supreme Court of the State of Kansas in Cases Nos. 411, 412, 413 and 414 is reported in 122 Kansas, p. 675, and the opinion of the Supreme Court of the State of Kansas in Cases Nos. 407, 408, 409, 410, 415, 416, 417 and 418 is reported in 122 Kansas, p. 691.

STATEMENT ON CONSOLIDATION.

Each of the defendants in error, G. L. Ramsey, The Ramsey Petroleum Company, M. R. Chastain, A. E. Lloyd, Alice M. Ramsey and W. O. James, commenced an action in the District Court of Butler County, Kansas, to recover deposits alleged to have been made in the Butler County State Bank, the actions being brought under Sections 9-163 and 9-164, R. S. 1923, as is more fully set out under the next heading, "Statement on Jurisdiction." They were as follows:

G. L. Ramsey commenced an action against C. L. King, H. F. Ferry, L. D. Hadley, A. B. Ewing, G. W. Lyon, E. F. Adams and C. L. Harris, as executor of the last will and testament of T. A. Kramer, deceased, to recover the sum of $22,726.16.

The Ramsey Petroleum Company brought the same kind of action against the same defendants to recover the sum of $27,211.96.

M. R. Chastain brought the same kind of action against the same defendants to recover the sum of $1,429.94.

A. E. Lloyd brought the same kind of action against the same defendants to recover the sum of $915.77.

Alice M. Ramsey brought the same kind of action against the same defendants to recover the sum of $7,063.67.

W. O. James brought the same kind of action against the same defendants to recover the sum of $7,819.72.

In all cases the pleadings of all parties were the same except the names of the plaintiff and the amount claimed.

The case brought by G. L. Ramsey was tried before a jury and a separate verdict was returned as to each of the defendants except the defendants Lyon and Adams, in whose favor demurrers to the evidence were sustained (R. Nos. 407 and 408, pp. 330-331), and as to whom no formal verdicts were returned. A separate judgment was rendered in favor of the plaintiff and against each of the defendants, C. L. King, H. F. Ferry, A. B. Ewing and L. D. Hadley, on the verdicts returned against them. On the verdict returned in favor of this plaintiff in error a separate judgment was rendered in favor of him and against G. L. Ramsey in bar of the action (R. Nos. 407 and 408, pp. 335-337). G. L. Ramsey appealed to the Supreme Court of the State of Kansas from the judgment rendered against him in favor of this plaintiff in error and from the judgment sustaining the demurrer to the evidence as to E. F. Adams. He made no one a party to this appeal except this plaintiff in error and E. F. Adams. This case was docketed separately in the Supreme Court of the State of Kansas. Afterwards C. L. King, H. F. Ferry and L. D. Hadley appealed from the judgments rendered against them in favor of G. L. Ramsey.

A transcript of the testimony in the G. L. Ramsey case was made, and each of the other cases mentioned above was tried before the Court without a jury under a stipu-

lation that the transcript of the testimony in the G. L. Ramsey case should be considered as the evidence in each of those cases with the additional evidence as to the amount of the deposit claimed by each plaintiff.

The case brought by The Ramsey Petroleum Company was the next case tried after the G. L. Ramsey case, and the Court found the facts against the defendants, King, Ferry, Ewing and Hadley, and found the facts in favor of this plaintiff in error. The Court made a separate finding as to this plaintiff in error (R. Nos. 407 and 408, p. 340). Separate judgments were rendered in favor of The Ramsey Petroleum Company against each of the defendants, C. L. King, A. B. Ewing, H. F. Ferry and L. D. Hadley. A separate judgment was rendered in favor of this plaintiff in error against the said The Ramsey Petroleum Company (R. Nos. 407 and 408, p. 340). Demurrers to the evidence were again sustained in favor of Adams and Lyon.

The Ramsey Petroleum Company appealed from the judgments rendered against it in favor of E. F. Adams and this plaintiff in error. Such appeal was docketed separately in the Supreme Court of the State of Kansas as case No. 27,213. C. L. King and H. F. Ferry appealed from the separate judgments rendered against them and this case was docketed as case No. 27,217. L. D. Hadley appealed from the separate judgment rendered against him in favor of The Ramsey Petroleum Company and this case was docketed separately as case No. 27,230. The Ramsey Petroleum Company in its appeals made no one parties except E. F. Adams and this plaintiff in error.

It having been called to the attention of the Supreme Court of the State of Kansas that these cases each presented the same question, they were ordered consolidated

for hearing, and the appellants, G. L. Ramsey and The Ramsey Petroleum Company, were granted permission to file one abstract, which appears in this record as the abstract in case No. 27,109 in the Supreme Court of Kansas, and is found in R. Nos. 407 and 408, pp. 1 to 367, inclusive. The opinion of the Supreme Court of Kansas is found in 122 Kans. 675.

And that Court entered a judgment in each case affirming the judgments in favor of E. F. Adams and the respective judgments against C. L. King, H. F. Ferry and L. D. Hadley, reversing the judgments in favor of this plaintiff in error, and remanded the cases with instructions to render a judgment in favor of each plaintiff in the court below against this plaintiff in error.

The cases brought by M. R. Chastain, A. E. Lloyd, Alice M. Ramsey and W. O. James were afterwards tried. The trial court in each of these cases found in favor of the plaintiffs and against the defendants, King, Ferry, Hadley and Ewing, and sustained demurrers to the evidence as to E. F. Adams and Lyon, and in each case made a separate finding in favor of this plaintiff in error, the findings being identical with the findings made in the case of The Ramsey Petroleum Company as set out in R. Nos. 407 and 408, p. 340. Separate judgments were rendered in each of these cases in favor of the plaintiff and against King, Ewing, Hadley and Ferry. The judgments were identical except as to amounts with the judgments rendered in the case of The Ramsey Petroleum Company (R. Nos. 407 and 408, pp. 340-341). Judgment was rendered in each of these cases in favor of this plaintiff in error and against the respective plaintiffs, which was in each case identical with the judgment rendered in the case of

The Ramsey Petroleum Company (R. Nos. 407 and 408, p. 340).

W. O. James appealed to the Supreme Court of the State of Kansas from the judgment rendered against him in favor of this plaintiff in error and from the order sustaining the demurrer to the evidence as to E. F. Adams. No other persons were made parties to this appeal. C. L. King, H. F. Ferry and L. D. Hadley appealed from the judgments rendered against each of them and in favor of W. O. James. These cases were docketed in the Supreme Court as case No. 27,395.

A. E. Lloyd appealed from the judgment rendered against him in favor of this plaintiff in error and from the judgment sustaining the demurrer to the evidence as to E. F. Adams. No other persons were made parties to this appeal. C. L. King, H. F. Ferry and L. D. Hadley appealed to the Supreme Court of the State of Kansas from the judgments rendered against each of them and in favor of A. E. Lloyd.

Alice M. Ramsey appealed from the judgment rendered against her in favor of this plaintiff in error and from the judgment sustaining the demurrer to her evidence as to E. F. Adams. No other parties were made parties to this appeal. C. L. King, H. F. Ferry and L. D. Hadley appealed from the judgments rendered against each of them and in favor of Alice M. Ramsey.

M. R. Chastain appealed from the judgment rendered against her and in favor of this plaintiff in error and from the judgment sustaining the demurrer to her evidence as against E. F. Adams. C. L. King, H. F. Ferry and L. D. Hadley appealed from the judgments rendered against each of them and in favor of M. R. Chastain.

The appeals in the G. L. Ramsey and The Ramsey Petroleum Company case came on for hearing in the Supreme Court of the State of Kansas, and the Court thereupon ordered the appeals in the James case, the Lloyd case, the Alice M. Ramsey case and the M. R. Chastain case to be submitted on the same argument and briefs and upon the same abstract made and filed in the G. L. Ramsey case and The Ramsey Petroleum Company case. The Court rendered a memoranda decision in these last cases and entered a judgment in each affirming the judgments in favor of E. F. Adams and the respective judgments against C. L. King, H. F. Ferry and L. D. Hadley, and reversing the judgments in favor of this plaintiff in error, and remanded these cases with instructions to render a judgment in favor of each plaintiff in the court below against this plaintiff in error.

Thus, it will be seen that the same question is involved in each of these cases. The pleadings of each of the parties to the suits and the evidence in each of the suits are the same, except as to the names of the different plaintiffs and the amount claimed. There is no difference in the verdicts, findings and judgments in the different cases in the trial court except as to the names of the plaintiffs and the amounts. There is no difference in the appeals to the Supreme Court of Kansas except as to the names of the appellants and the same judgment was rendered by the Supreme Court of Kansas in each of the cases.

From the judgment of the Supreme Court of the State of Kansas in the G. L. Ramsey case reversing the judgment of the court below in favor of this plaintiff in error, this plaintiff in error is prosecuting a writ of error to this Court. He is also prosecuting a like writ of error from the like judgments of the Supreme Court of Kansas ren-

dered against him in each of the other cases, to wit: The Ramsey Petroleum Company case, the W. O. James case, the A. E. Lloyd case, the Alice M. Ramsey case and the M. R. Chastain case.

The record in the Supreme Court of the State of Kansas in these various cases, setting out the testimony and the opinions of the Supreme Court in all of the cases and the judgments rendered in the G. L. Ramsey case and The Ramsey Petroleum Company case are all printed in R. Nos. 407 and 408, pp. 1 to 369, inclusive.

An order of consolidation and with reference to printing was made by the Supreme Court of the United States, consolidating cases 407 to 418, inclusive (R. Nos. 407 and 408, p. 396; R. Nos. 409 and 410, p. 26; R. Nos. 411 and 412, p. 26; R. Nos. 413 and 414, p. 26; R. Nos. 415 and 416, p. 25; R. Nos. 417 and 418, p. 25).

Under this order the cases were consolidated for hearing with directions to print the whole record in two of the cases and only so much of the record in the remaining cases as was necessary to show the difference between the cases, and a praecipe in accordance with this order was filed with the clerk of the Supreme Court for the printing of the record (R. Nos. 407 and 408, p. 395).

The writs of error prosecuted by C. L. Harris as executor were docketed in this court and appear as cases numbered 408, 410, 412, 414, 416 and 418.

H. F. Ferry prosecuted separate writs of error from this court to the Supreme Court of the State of Kansas on the judgments rendered against him and these cases are docketed in this court as Nos. 407, 409, 411, 413, 415 and 417.

STATEMENT ON JURISDICTION.

The date of the judgment of the Supreme Court of Kansas in each of the cases is February 12, 1927 (R. in 407, 408, p. 347; R. in 409, 410, p. 1; R. in 411, 412, p. 2; R. in 413, 414, p. 2; R. in 415, 416, p. 1; R. in 417, 418, p. 1).

Petitions for rehearing were denied in each of the cases April 16, 1927 (R. in 407, 408, p. 369; R. in 409, 410, p. 1; R. in 411, 412, p. 2; R. in 413, 414, p. 2; R. in 415, 416, p. 1; R. in 417, 418, p. 1).

Each of the defendants in error, Alice M. Ramsey, W. O. James, The Ramsey Petroleum Company, G. L. Ramsey, M. R. Chastain and A. E. Lloyd, was a depositor in the Butler County State Bank, located at El Dorado, Kansas. C. L. King was president and a director of the bank, H. F. Ferry was cashier and a director, A. B. Ewing, L. D. Hadley and T. A. Kramer were directors of the bank. The State Bank Commissioner took charge of the bank March 30, 1923. Shortly thereafter each of the above-named defendants in error commenced a suit against the said officers and directors, and also against E. F. Adams and G. W. Lyons to recover the balance to his credit in said bank. The petitions in each of the suits were exactly the same, except as to the name of the plaintiff and the amount claimed. Each suit was based on the following provisions of the statutes of the State of Kansas:

> "9-163. Transactions During Insolvency.—It shall be unlawful for any president, director, manager, cashier, or other officer of any banking institution, to assent to the reception of deposits or the creation of debts by such banking institution, after he shall have had knowledge of the fact that it is insolvent or in failing circumstances; and it is hereby made the duty of every such officer, agent or manager of such bank-

ing institution to examine into the affairs of the same, and, if possible, know its condition. And upon failure of any such person to discharge such duty, he shall, for the purpose of this act, be held to have had knowledge of the insolvency of such bank, or that it was in failing circumstances. Every person violating the provisions of this section shall be individually responsible for such deposits so received, and all such debts so contracted. **Provided**, any director who may have paid more than his share of the liabilities mentioned in this section may have the proper remedy at law against such other persons as shall not have paid their full share of such liabilities."

"9-164. Proceedings Under Foregoing Section.—In all suits brought for the recovery of the amount of any deposits received or debt so created, all officers, agents or managers of any such banking institutions charged with having so assented to the reception of such deposit, or the creation of such debt, may be joined as defendants or proceeded against severally; and the fact that such banking institution was so insolvent or in failing circumstances at the time of the reception of the deposit charged to have been so received, or the creation of the debt charged to have been so created, shall be prima facie evidence of such knowledge and assent to such deposit or creation of such debt on the part of such officer, agent or manager so charged therewith."

Each defendant in each suit filed a separate answer. In each answer of this plaintiff in error he alleged that the above-mentioned sections of the Revised Statutes of Kansas for 1923 were unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States (R. in 407, 408, p. 31).

In each answer this plaintiff in error set forth the physical and mental incapacity of T. A. Kramer, his decedent,

during all of the time in question in the suits (R. 407 and 408, pp. 26 to 29).

Demurrers were sustained to the allegations of the answers alleging the unconstitutionality of these statutes (R. in 407, 408, p. 456).

An appeal was taken to the Supreme Court of the State of Kansas from the ruling of the Court sustaining these demurrers, and the action of the lower court was sustained.

Ramsey Petroleum Company v. E. F. Adams et al., 119 Kan. 844, 241 Pac. 433.

Upon the trial this plaintiff in error objected to the introduction of any evidence because of the unconstitutionality of said statutes (R. in 407 and 408, pp. 89, 90).

Upon the trial the evidence showed that T. A. Kramer during all of the time in question was physically and mentally incapacitated to transact any business; that he became seriously ill in Boston in August, 1922; that after remaining there for some time in a hospital he was taken to East St. Louis, Illinois; that he was unable to leave East St. Louis, but remained there until he died in July, 1923; and, of course, during said time did not examine into the affairs of the bank (R. in 407, 408, pp. 221, 234-242).

The evidence also showed that E. F. Adams and G. W. Lyons were not directors of the bank at any of the times in question, and the Court sustained a demurrer to the evidence as to them in each of the cases on this ground.

A separate verdict was returned by the jury as to each defendant in the case tried to the jury (R. in 407, 408, p. 330), and a separate finding was made by the Court as to each defendant in the cases tried by the Court (R. in 407, 408, pp. 339 and 340).

A separate judgment was rendered in each case as to each defendant. A judgment was rendered against C. L. King for the full amount claimed in each case and a like judgment against H. F. Ferry, L. D. Hadley and A. B. Ewing and a judgment was rendered in each case in favor of this plaintiff in error and against the plaintiff in each case (R. Nos. 407, 408, pp. 335, 336, 337, 340 and 341).

From each judgment in favor of this plaintiff in error each respective plaintiff in the court below prosecuted an appeal to the Supreme Court of the State of Kansas and from each judgment in favor of the plaintiff and against C. L. King, H. F. Ferry and L. D. Hadley they each appealed to the Supreme Court of the State of Kansas.

In each of the appeals of the said plaintiffs against this plaintiff in error, this plaintiff in error again contended that each of the statutes above mentioned was unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States. This contention was taken up, discussed and decided by the Supreme Court of the State of Kansas and each of said statutes was held to be valid and not in violation of the Fourteenth Amendment to the Constitution of the United States and it was further held that under the provisions of said sections 9-163, T. A. Kramer's representative was prohibited from showing any reason or excuse why said T. A. Kramer had not made an examination of the bank and the Court held that T. A. Kramer was conclusively held to have had knowledge of the insolvent condition of the bank because of his failure to examine (R. in 407, 408, p. 348).

The Supreme Court affirmed the judgment in favor of E. F. Adams in each case and affirmed each of the judgments against C. L. King, H. F. Ferry and L. D. Hadley and reversed the judgments in favor of this plaintiff in error with directions to the lower court to enter judgment

in each case against this plaintiff in error for the amounts claimed to be due by the plaintiffs below.

Jurisdiction of this Court is invoked under the provisions of ~~a~~ paragraph a of Section 237 of the Judicial Code, United States Code, Title 28, Sec. 344.

The following decisions sustain the jurisdiction of this Court to review the judgment below:

Commonwealth Bank of Ky. v. Griffith, 14 Pet. 56, 39 U. S. 55;
Merchants Natl. Bank v. City of Richmond, 256 U. S. 635, 65 L. Ed. 1135.

STATEMENT.

All of the above actions were brought in the District Court of Butler County, Kansas, to recover of the officers and directors of the Butler County State Bank on account of deposits made by the different plaintiffs in the month of March, 1923, a time when it was claimed the bank was in an insolvent condition and so known to be to such officers and directors.

The parties sued in each case were C. L. King, H. F. Ferry, L. D. Hadley, A. B. Ewing, E. F. Adams, G. W. Lyon and this plaintiff in error. In each of the cases the Court, at the close of the plaintiff's testimony, sustained demurrers as to Lyon and Adams on the ground that the evidence showed they were not officers or directors of the bank at the time of the reception of the deposits in question.

The case brought by G. L. Ramsey was tried to a jury and the Court submitted separate verdicts, one for each defendant, which appear on page 330 R. in Nos. 407-408. The jury returned separate verdicts as to each of the de-

fendants. As to this plaintiff in error the jury returned a verdict in his favor and against the plaintiffs. In the cases tried before the Court, separate findings were made and separate judgments rendered as to each of the defendants and in each of the cases the Court found in favor of this plaintiff in error and against the various plaintiffs.

In each of the cases tried in the District Court the various plaintiffs appealed from the various judgments rendered in favor of E. F. Adams, sustaining her demurrer to the evidence and to the various judgments rendered in favor of this plaintiff in error and against the various plaintiffs. In each of these appeals the plaintiff below made none of the parties in the lower court parties to the appeals except this plaintiff in error and E. F. Adams. C. L. King, H. F. Ferry and L. D. Hadley prosecuted separate appeals from the judgments rendered against them and in favor of the plaintiffs. The appeals were docketed as separate causes, but were argued and submitted on the briefs and abstract filed in the G. L. Ramsey case and in the Ramsey Petroleum Company case so that the appeals of the Supreme Court stood as follows:

G. L. Ramsey appealed from the judgment rendered against him in favor of this plaintiff in error and Adams; so did the Ramsey Petroleum Company and each of the other plaintiffs below in each of the other cases in the District Court of Butler County. In each of these appeals the Court affirmed the judgment as to Mrs. Adams, so that she is no longer interested in any way in these cases and has no judgment against her, and she went out of the cases on the sole proposition that she was neither an officer or director of the bank at any of the times involved in any of these cases. The Supreme Court of Kansas reversed the various judgments in favor of this plaintiff in

error, with instructions to enter in each of the cases a judgment in favor of the respective plaintiffs and against this plaintiff in error. No one was a party in the Supreme Court of Kansas in any of these appeals from the judgments of the lower court in favor of E. F. Adams and this plaintiff in error, except the plaintiffs in the various cases and this plaintiff in error and E. F. Adams. E. F. Adams, upon a decision of the Supreme Court of the State of Kansas, affirming the judgments of the lower court in her favor, had no further interest of any kind in the litigation. From the judgment of the Supreme Court in each of these various cases, reversing the judgment of the lower court in his favor and ordering a judgment against him, this plaintiff in error has prosecuted a writ of error.

In the District Court separate answers were filed by each of the defendants in such actions.

This plaintiff in error filed an answer in each suit, in which he denied all the allegations of the petition and in addition alleged that Section 9-163 of the Revised Statutes of 1923, under which the action was brought, was in violation of the Fourteenth Amendment to the Constitution of the United States, in that it sought to deprive him of property wtihout due process of law, and in that it denied to him in the jurisdiction of the State of Kansas equal protection of the law. And also alleged that Section 9-164, Revised Statutes of 1923, was in violation of the Fourteenth Amendment to the Constitution of the United States, in that it denied to him equal protection of the law, and in that it deprived him of property without due process of law (R. Nos. 407-408, p. 31). He also denied that the bank was insolvent or in failing circumstances at the time of the reception of the deposits, and denied that his decedent, T. A. Kramer, knew that said

bank was in a failing condition or insolvent, and denied that the said T. A. Kramer, by an examination into the affairs of the bank could have ascertained that the bank was insolvent or in failing circumstances; denied that T. A. Kramer assented to any reception of such deposit, and also denied that T. A. Kramer, at any time, participated in the active conduct and management of the affairs of said bank, except in connection with such duties as he may have performed from time to time as a director of said bank.

He also made the following allegations:

"And further answering, this defendant alleges that T. A. Kramer, prior to the 10th day of July, 1922, and about the.....day of August, 1918, lived in the State of California, and on said last-mentioned date and while still in California was taken sick with obstruction of the bowels and was compelled to and did undergo a severe surgical abdominal operation, from the result of which he never fully recovered, and on or about the .... day of May, 1920, he returned to Eldorado, Kansas, where he was again compelled, by an aggravated recurrence of said trouble, to undergo another serious abdominal operation, and was by reason thereof unable to attend to any business, and was confined to the hospital where the operation was performed for a period of about three weeks, and after his discharge from the hospital was sick and enfeebled by reason of such condition, and never fully recovered therefrom. That on or about the 10th day of July, 1922, being still enfeebled and in poor health, he left Eldorado on a trip for the purpose of rest and recuperation, and went to East St. Louis, Illinois, where he remained with his brother, R. J. Kramer, until July 23, 1922, when, still seeking rest and recuperation, he left with his brother, J. H. Kramer,

for an Eastern trip, and on August 15, 1922, when near the City of Boston, Massachusetts, he had an attack of complete bowel obstruction, which entirely prevented the passage of fecal matter through the bowels, and was immediately taken to the Commonwealth Avenue Hospital and placed in charge of competent surgeons, and on August 16, 1922, he underwent a surgical operation for this trouble, which was performed by Dr. Henry M. Chase of Boston. His abdomen was opened and it was found that the small intestines were completely obstructed by a large number of adhesions, and that the small intestines were ruptured and it was impossible to release all the adhesions. That the rupture of the small intestines never healed, but remained open during the the remainder of his life, and the incision in his abdomen made in such operation remained open during the rest of his life. That for a time after said operation it was impossible for him to take nourishment in the usual way, and it became necessary to give him nourishment through the opening in the bowels.

"That from the 16th day of August, 1922, until the time of his death, which occurred July, 1923, he had what is known as a fecal fistula at the place where the incision was made for the operation, and during all the remainder of his life fecal matter from the small intestines constantly passed from the opening and inflamed the wound and flesh about the wound, and caused him great and constant pain and suffering. For some time after said operation he was sick and hovered between life and death with little hope of recovery, and afterwards and on September 4, 1922, his condition became so serious that it became necessary to perform another abdominal operation, and such operation was performed and restrictions of the bowels at different places were removed so far as it was possible to remove the same, but it was impos-

sible to remove all of such restrictions. In this operation another opening was made through the abdominal walls over the cecum in the illio cecal region. That on account of his weakened physical condition it was impossible at this operation to give him an anesthetic, and in the performance of this operation a local anesthetic, called novocain, was used. After this operation he remained very sick and weak for more than a month, but finally gained sufficient strength so that by the middle of October, 1922, he was able to sit in a chair and move about the room without assistance.

"That on or about the 1st day of November, 1922, while he was still suffering greatly, it was determined best to remove him from said hospital and take him to East St. Louis, Illinois, to the home of his brother, R. J. Kramer, where he might be among his relatives, and where he might receive and could receive and would receive the personal care and attention which he required.

"That during his trip from Boston to East St. Louis, he had to remain in his berth in the drawing room under the constant care of his nurse. That after he arrived at East St. Louis, he regained sufficient strength to enable him to walk about a little in the room, but this lasted for only two or three days. That he remained in East St. Louis until he died there on the 23rd day of July, 1923. That during all the time he was in East St. Louis, except the period of two or three days above mentioned, he was confined to his bed, except for short periods during which he was able to sit up in his chair when placed therein by his attendant.

"That during all the time from the first operation until the time of his death he was under the care of surgeons and physicians and two nurses.

"That about the middle of December, 1922, it became apparent to his physicians that another opera-

tion was necessary, and he was thereupon removed to the Deaconess Hospital in East St. Louis, and on December 20, 1922, another abdominal operation was performed, to wit, the abdomen was opened at the outer border of the left rectus muscle, and the small intestine was anastomosed with the large intestines, and it was then discovered that it was impossible to release or remove all the adhesions binding the small intestines. That after this operation his condition did not improve, and the fistula before mentioned did not heal. That he remained at said hospital about a month, when he was again taken to the home of his brother in East St. Louis, where his condition gradually grew worse until the date of his death.

"That from the time of his first operation until the time of his death, by reason of his sickness, suffering and physical condition he was unable to attend to any business of importance. That he suffered all the time intense and severe pain; that by reason of his condition he was unable to return to Eldorado at any time from the date of his first operation, on August 16, 1922; that his suffering was so intense, his physical condition of such a character and nature and so affected him that it was impossible for him to direct his mind for any length of time to any business matter, or give any attention to any business affairs at any time, and he was unable to concentrate his mind for any length of time on any of his affairs.

"That by reason of the facts and circumstances above set forth, it was impossible for him to give any attention to the affairs of said Butler County State Bank and during all of said period he had no access to the books and records of said bank and was in no condition physically or mentally to make any examination of the business or the condition of said bank, and it was impossible for him to assent to the acceptance of any deposits in said bank. That during all the period of his illness as above described he was

constantly attended by his brothers and their families, and, acting under the advice of his physicians, all matters of business were kept from him so far as possible, to prevent him from worrying over the same and injuring his health thereby. That it would have been impossible for him to give any serious attention or consideration to business matters without seriously injuring his health and shortening his life."

Evidence was offered in support of the above allegations, and the physical and mental condition of Mr. T. A. Kramer, from the time he was taken sick in Boston, July, 1922, until the date of his death, was shown to be substantially as set out in the answers (R. Nos. 407, 408, pp. 221, 234 to 242).

At the close of the testimony in relation to the physical and mental condition of T. A. Kramer, the plaintiff in the lower court interposed an objection, which was overruled. The objection is found on page 242 of the transcript of the record in cases Nos. 407 and 408.

The Court instructed the jury in the jury case that if it found from the evidence that Kramer was in the condition described and by reason thereof unable to examine into the condition of the bank, it should not take into consideration such failure in determining the question of whether he did or did not have knowledge of the insolvent condition of the bank, and instructed it that if he was in the condition described, and by reason thereof physically or mentally unable to make any examination, he would not be required to make an examination and he would not be chargeable with failure so to do (pp. 324, 325 R. in 407 and 408).

Separate verdicts were submitted as to each of the defendants. Five verdicts were returned into court, one of them finding against C. L. King in the sum of $19,379.34,

and similar verdicts as to the other defendants except this plaintiff in error. They returned the following verdict as to him:

> "We, the jury impaneled and sworn in the above-entitled cause, do upon our oath find for the defendant C. L. Harris, executor of the estate of T. A. Kramer, deceased, not liable on account of said T. A. Kramer being physically unfit to know the condition of the Butler County State Bank at the time the deposits were made by the plaintiff that are now in controversy" (R. Nos. 407, 408, p. 330).

The plaintiff filed a motion for a new trial, which was overruled. Separate judgments were entered on the verdicts. The judgment as to King, Ferry and Ewing is found on pages 335 and 336 of the transcript of the record in Nos. 407, 408). The judgment as to this plaintiff in error is found on pages 336 and 337. The judgment as to this plaintiff in error was that the plaintiff take nothing by reason of his cause of action and that the judgment be rendered in favor of C. L. Harris, as executor of the last will and testament of T. A. Kramer, that he go hence without day and that he recover his costs from the plaintiff. All of the other cases here on writs of error were tried before the Court without a jury and submitted on the evidence introduced in the G. L. Ramsey case, as found in the transcript of the record of Nos. 407, 408, pages 1 to 290, inclusive, and the additional evidence as to the amounts of the various deposits. In each of the cases tried before the Court the Court made separate findings against the separate defendants and rendered a separate judgment against the defendants other than this plaintiff in error.

In the case of the Ramsey Petroleum Company a separate judgment was rendered against C. L. King for the sum of $27,211.96, with interest, and a similar judgment rendered against H. F. Ferry; also one against A. B. Ewing and one against L. D. Hadley for a like amount.

The Court made a special finding as to T. A. Kramer, as follows:

> "The Court further finds that at the time of the making of the deposits set out in the plaintiff's amended petition that by reason of the physical and mental incapacity of T. A. Kramer that said T. A. Kramer was unable to make any examination of the books and records of the Butler County State Bank of Eldorado, Kansas, and had no personal knowledge of the making of such deposits, and that by reason of such physical and mental incapacity did not assent to the reception of such deposits by said bank, and that against the defendant C. L. Harris, executor of the last will and testament of T. A. Kramer, deceased, that plaintiff is not entitled to recover in this action and that such defendant should recover judgment against the plaintiff for costs herein expended."

In each of the other cases the trial court made similar findings and rendered similar judgments in favor of this plaintiff in error. From the various judgments rendered in favor of this plaintiff in error the various plaintiffs appealed to the Supreme Court of the State of Kansas, where it was contended by them that the incapacity of Kramer constituted no defense and that under the provisions of Section 9-163, Revised Statutes of 1923, if he did not examine, he was conclusively held to have knowledge of the condition of the bank and could not be heard to have any excuse or reason for such failure to examine, while this plaintiff in error contended that Section 9-163

of the Revised Statutes, if so construed, was in violation of the Fourteenth Amendment to the Constitution of the United States, in that, so construed, it deprived him of property without due process of law and denied to him the equal protection of the law. He also contended that Section 9-164 was in violation of the Fourteenth Amendment to the Constitution of the United States for the same reason.

The Supreme Court of the State of Kansas held with the appellants in each of the cases, holding that the special defense of incapacity was unavailing, held that the instructions of the Court, Nos. 22, 23, 24 and 25 were each erroneous and held, as stated in the motion of the defendants in error to dismiss these writs of error, that the fact that the statutes hold the director to possess knowledge of the insolvency or the failing circumstances of the bank and does not permit him to show any excuse for failure to examine, does not deprive him of property without due process of law and does not deny him the equal protection of the law, and held that when insolvency or failing circumstances of a bank is established as a fact, then knowledge of that fact is held to the director if he failed to discharge the duty imposed by the statute; that when T. A. Kramer accepted the office as director of the Butler County Bank he accepted it subject to all the requirements, obligations and liabilities imposed by the statute. That the prohibition and requirements of the statutes are positively mandatory; that failure to conform to the rule of conduct laid down in the statute imposed the liability thereby created and from which there is no escape. This is clearly set out in the argument of the defendants in error on their motion to dismiss.

The Supreme Court of the State of Kansas also held, as stated on page 12 of such argument, that an officer or

director charged with a violation of the statute has the right to defense on the issue of insolvency or failing circumstances, but he does not have the right to set up his ignorance occasioned by failure to discharge the duty imposed by statute as a defense against the liability thereof, and held as stated on page 13 of said brief, that when the State of Kansas enacted the provisions of the statute hereinbefore set out, it laid down the yardstick by which the liability of a director or officer of a bank was to be measured, and that such statute contained the rule by which to measure the right to recover from directors for loss occasioned from violation of the duty imposed by statute. That it mattered not from what circumstances such violation arose.

It was contended by this plaintiff in error that such construction of the statute deprived his decedent's estate of property without due process of law and denied to him the equal protection of the law.

The Supreme Court of the State of Kansas, holding in substance as above set out, reversed the judgment of the District Court of Butler County Kansas, in each of the cases in favor of this plaintiff in error, with instructions to the lower court to set aside such judgments and render a judgment in favor of each of the plaintiffs in the trial court, and it is from such judgments that these writs of error are prosecuted.

SUMMARY.

Writs of Error Not Frivolous.

The first two grounds for dismissal involve the question of whether a substantial federal question is involved. A case coming to the United States Supreme Court from a state court on a writ of error will not be dismissed as frivolous or as foreclosed by a former decision when analysis of these decisions is necessary.

> Louisville and Nashville Railroad Company v. Melton, 218 U. S. 36.

A federal question is not frivolous so as to require dismissal of a writ of error seeking to present it to the Supreme Court of the United States, if it requires analysis and exposition for its decision.

> Milheim et al. v. Moffatt Tunnel Improvement Dist. et al., 262 U. S. 710, 67 L. Ed. (U. S.) 119.

Section 9-164 of the Revised Statutes of Kansas for 1923 is unconstitutional as in violation of the Fourteenth Amendment to the Constitution of the United States, because it deprives persons, and particularly this plaintiff in error and his decedent's estate, of property without due process of law and denies equal protection of law by seeking to create a prima facie presumption of assent by proof of a fact entirely unrelated to the main fact sought to be established.

> Railway Company v. Turnipseed, 219 U. S. 35;
> Hawes v. Georgia, 258 U. S. 1;
> Manning v. John Hancock Mut. L. Ins. Co., 100 U. S. 693;

Luria v. United States, 231 U. S. 9-25;
McFarland v. American Sugar Co., 241 U. S. 79;
Bailey v. Alabama, 219 U. S. 219.

Section 9-164 of the Revised Statutes of Kansas for 1923 is unconstitutional and violative of the Fourteenth Amendment in that it deprives persons, and particularly this plaintiff in error and his decedent's estate, of property without due process of law by creating a presumption which is based upon a presumption.

5 C. J. 811;
Welch v. Sackett, 12 Wis. 243-257;
Jewell v. Jewell, 84 Me. 304-307, 24 Atl. 858;
Hanscom v. Home Ins. Co., 92 Me. 333, 339, 38 Atl. 324;
Patterson v. Stewart, 41 Minn. 84, 94, 42 N. W. 926;
22 C. J. 84;
Railroad Co. v. Baumgartner, 74 Kans. 148;
United States v. Ross, 92 U. S. 281;
Manning v. John Hancock Mut. L. Ins. Co., 100 U. S. 693, 10 Ann. Cases 1097;
Cunard Steamship Co. v. Kelley, 126 Fed. 610, 66 C. C. A. 533;
10 R. C. L. 870;
Duncan v. Railroad Co., 82 Kans. 230.

Section 9-163 of the Revised Statutes of Kansas for 1923, as construed by the Supreme Court of the State of Kansas in these cases, violated the provisions of the Fourteenth Amendment to the Constitution of the United States as to this plaintiff in error in that it required the decedent of this plaintiff in error to do the impossible.

"Impossibilium Nulla Obligatio Est," Wharton Legal Lexicon;
31 C. J. 258;

First Natl. Bank of Belle Plaine v. McConnell, 14 L. R. A. (n. s.), 616-618, 114 N. W. 1128;
"Impotentia Excusat Legem," Bouvier Law Dictionary;
Bayer v. Hoboken, 40 N. J. L. 152, 155;
Parker's Estate, 19 Pa. Co. 606-608;
"Lex Non Cogit Ad Impossibilia," Broom's Legal Maxims, *238;
"Lex Non Intendit Alliquid Impossibile," Black's Law Dictionary.
36 C. J. 1048;
Williams v. Hays, 157 N. Y. 541, 43 L. R. A. 253, 255;
United States v. Kirby, 7 Wall. 482;
People v. McRoberts, 62 Ill. 38;
Fusz v. Spaunhorst, 67 Mo. 256;
St. Louis and S. F. Ry. Co. v. Evens and Howard Brick Co., 85 Mo. 307-329;
Donaldson v. Wood, 26 Wend. 399;
Henderson v. Mayor of New York, 92 U. S. 268;
In re Leong Yick Dew, 19 Fed. 490, 495;
Runyan et al. v. Culver, L. R. A. (1916 F) 3;
Wheeler v. Conn. Mut. Life Ins. Co., 82 N. Y. 543;
Berg v. Erickson, 234 Fed. 817, L. R. A. (1917 A) 648 651;
Usher v. Hiatt, 18 Kans. 195;
Briggs v. Spaulding, 141 U. S. 132.

Section 9-163 of the Revised Statutes of Kansas for 1923 violates the Fourteenth Amendment to the Constitution of the United States because it creates a conclusive presumption of knowledge on account of failure to examine the bank. This was not within the power of the Kansas Legislature.

Bailey v. State of Alabama, 219 U. S. 219;
Cooley on Constitutional Limitations (5th Ed.), 453;

Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. Ed. 234;
Galveston H. & S. A. R. Co. v. Texas, 210 U. S. 217;
Louisville & Nashville Ry. Co. v. Melton, 218 U. S. 36;
Luria v. United States, 231 U. S. 9, 58 L. Ed. 101;
Larson v. Dickey, 42 Am. Rep. 595;
Milheim et al. v. Moffatt Tunnel Imp. Dist. et al., 262 U. S. 710, 67 L. Ed. 1194;
Meyer v. Berland, 39 Minn. 438, 12 Am. St. Rep. 663, 40 N. W. 513;
McFarland v. American Sugar & Refining Co., 241 U. S. 79, 36 Sup. Ct. Rep. 498;
Orient Inc. Co. v. Daggs, 172 U. S. 557, 43 L. Ed. 552;
Railroad Co. v. Simonson, 64 Kans. 802;
Railway Co. v. Payne, 83 Ark. 816, 34 Am. Rep. 55;
Railway Co. v. Parks, 32 Ark. 131;
Railway Co. v. Turnipseed, 219 U. S. 35;
Schlesinger v. Wisconsin, 270 U. S. 230, 70 L. Ed. 557;
Vega S. S. Co. v. Elevator Co., 74 Am. St. Rep. 484;
Yee Hem v. U. S., 260 U. S. 178, 69 L. Ed. 904;
Ziegler v. Railroad Co., 58 Ala. 599;
6 R. C. L., 453, 462.

Questions of fact are not open in the Supreme Court of Kansas on appeal.

Bayer v. Cockerill, 3 Kans. 282;
Mueller v. Campbell, 95 Kans. 420;
Bartells v. School District, 89 Kans. 233;
Bateman et al. v. Preisser et al., 123 Kans. 217;
Reeves v. Sroade, 124 Kans. 423.

A writ of error to this Court would not lie from the decision of the Supreme Court of Kansas in the case of Ram-

sey Petroleum Company v. Adams, 119 Kans. 844, because that was not a final decision.

Georgia Ry. & Power Co. et al. v. Town of Decatur, 262 U. S. 432.

There is no want of necessary parties as plaintiffs in error.

Winters v. U. S., 207 U. S. 564;
Gilfillan v. McKee, 159 U. S. 303;
Henrick v. Patrick, 119 U. S. 156;
Germain v. Mason, 12 Wallace 259;
Cox et al. v. U. S., 6 Peters 172;
Alsop v. Conway et al., 188 Fed. 568 (C. C. A. 6th);
Hightower et al. v. American National Bank of Macon, 276 Fed. 371 (C. C. A. 5th);
Adamson et al. v. Blackrock P. & I. Co., 12 Fed. (2nd) 437 (C. C. A. 9th);
Love v. Export Storage Co. et al., 143 Fed. 1 (C. C. A. 6th).

ARGUMENT.

Section 9-164 of the Revised Statutes of Kansas for 1923 is unconstitutional and is in violation of the Fourteenth Amendment to the Constitution of the United States because it deprives persons, and particularly this plaintiff in error and his decedent's estate, of property without due process of law and denies equal protection of law by seeking to create a prima facie presumption of assent by proof of a fact entirely unrelated to the main fact sought to be established.

Section 9-164, Revised Statutes of Kansas for 1923, provides that proof of insolvency shall be prima facie evidence both of knowledge of the insolvency of the bank and of assent to the reception of deposits.

Every man is presumed to do his duty. The law does not presume that anyone charged with an obligation violates the obligation. The law forbids the reception of deposits when it is known that the bank is insolvent and makes every officer assenting to the reception of deposits when he knows the bank insolvent individually liable for such deposits so received.

It is, therefore, to be presumed that an officer and director of a bank will not violate this provision of this statute. When proof is introduced tending to show that the bank was insolvent at the time of the reception of the deposit in question, such proved fact may tend to prove that the officer or director of the bank had knowledge of its condition, but it has no tendency to prove that he assented to the reception of deposits. The natural presumption would be that an officer, who is presumed to do his duty, would not assent to the reception of deposits when he knew that the bank was insolvent.

Certain facts may tend to prove certain other facts, but it is essential that such fact shall have a rational connection with the fact to be proved; that is, there must be a rational connection between the fact proved and the ultimate fact presumed. The inference that one fact may prove another shall not be so unreasonable as to be arbitrary. In what way does the mere fact that a bank was insolvent at a certain time tend to prove that the officer or director of the bank violated his oath of office and assented to the unlawful reception of deposits? Applied to the cases before this Court, what tendency does the mere fact that in the month of March, 1923, when certain deposits were received in the Butler County State Bank, the bank was insolvent have to prove that T. A. Kramer, who was five hundred miles away, confined to his bed under the influence of opiates, mentally and physically incapacitated from transacting any business of any kind, then assented to the reception of such deposits?

In the case of Railway Company v. Turnipseed, 219 U. S. 35, at page 43 of the opinion, it is said:

> "That the legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law. It is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed."

To the same effect is the holding in Luria v. United States, 231 U. S. 9-25.

In the case of McFarland v. American Sugar Company, 241 U. S. 79, it was held that a Louisiana statute, creating the rebuttable presumption that any person systematically paying in that state a less price for sugar than he paid in another state was a party to a monopoly or conspiracy in restraint of trade, was unconstitutional under the Fourteenth Amendment, as being so arbitrary as to be beyond possible justice, the presumption created having no foundation except an intent to destroy, and there is no rational connection between the fact proved and the ultimate fact presumed.

In the case of Hawes v. Georgia, 258 U. S. 1, on page 4 of the opinion, it is said:

> "In Hawkins v. Bleakly, 243 U. S. 210-214, it is said: 'The establishment of presumptions and all rules respecting the burden of proof is clearly within the domain of the state governments, and that a provision of this character not unreasonable in itself and not conclusive of the rights of the party does not constitute a violation of due process of law (Mobile, Jackson & Kansas City R. R. Co. v. Turnipseed, 219 U. S. 35-42).' Undoubtedly there must be a relation between the two facts (Bailey v. Alabama, 219 U. S. 219; McFarland v. American Sugar Refining Co., 241 U. S. 79); that is, if one may be evidence of the other, there must be connection between them—a requirement that reasoning insists on and necessarily the law."

Section 9-163 of the Revised Statutes of Kansas for 1923, as construed by the Supreme Court of the State of Kansas in these cases, violates the provisions of the Fourteenth Amendment to the Constitution of the United States as to this plaintiff in error in that it required the decedent of this plaintiff in error to do the impossible.

The Supreme Court of the State of Kansas held that the provisions of section 9-163, which provide that it shall be the "duty of every such officer, agent or manager of such banking institution to examine into the affairs of the same, and, if possible, know its condition; and upon failure of any such person to discharge such duty, he shall, for the purpose of this act, be held to have had knowledge of the insolvency of such bank, or that it was in failing circumstances," was mandatory and compulsory, that no excuse for failure to examine would avail an officer, or director; and that the fact that the decedent of this plaintiff in error was sick and unable, mentally and physically, to make any examination of the bank, or to attend to any business matter in connection with the bank, or to come to Eldorado, where the bank was located, for the purpose of making an examination, furnished no excuse whatever for his failure to examine; that his failure under such conditions charged him with knowledge of the insolvent condition of the bank or that it was in failing circumstances at the time each deposit was made; and that he would not be permitted to offer any evidence showing his condition or any excuse whatsoever for his failure to examine.

This holding of the Supreme Court required the decedent of this plaintiff in error to do the impossible. It interpreted the statute so that the Legislature by this provision of the act was held to have required the impossible. This neither the Court nor the Legislature can require.

Such holding violates the provisions of the Fourteenth Amendment to the Constitution of the United States, and it violates the fundamental principles of the common law and every principle of justice.

The universal rule is, or was until the Supreme Court of Kansas spoke, that where an obligation or duty is imposed upon a person by law, he will be absolved from liability for nonperformance if such nonperformance was caused by an act of God or because of impossibility.

The legal maxims, "Impossibilium nulla obligatio est," "Impotentia excusat legem," "Lex non cogit ad impossibilia" and "Lex non intendit alliquid impossibile," are universally recognized.

In Broom's Legal Maxims it is said:

> "The law in its most positive and peremptory injunctions is understood to disclaim, as it does in its general aphorisms, all intention of compelling to impossibilities and the administration of laws must adopt that general exception in the consideration of all particular cases."
>
> "The law intends what is agreeable to reason; it does not suffer an absurdity. Impossibility is an excuse in law and there is no obligation to perform impossible things."
>
> Williams v. Hays, 157 N. Y. 541, 43 L. R. A. 253-255.

"Impossibilium nulla obligatio est. The law never requires the doing of an impossible thing (Dow v. State Bank, 88 Minn. 355, 93 N. W. 121), though it often awards damages for a failure to perform express contract stipulations, where performance was rendered impossible by reason of intervening overpowering causes other than an act of God (9 Cyc Law

and Proc. 627) but the principle involved in cases of that kind does not apply to duties or obligations arising by implication of law (Paradine v. Jane, Aleyn, 26; School District No. 1 v. Daughy, 25 Conn. 530, 68 Am. Dec. 371). In other words, a person will be relieved from the performance of a duty imposed upon him by law where the performance is rendered impossible by reason of causes for which he was not responsible, where he would not for similar reasons be relieved from express contract stipulations. * * * The duty to present them for payment is one imposed by law, not by express contract, and compliance therewith being impossible, plaintiff's failure to present them is not fatal to its right to recover thereon."

First National Bank of Belle Plaine v. McConnell, 14 L. R. A. (n. s. 616-618, 114 N. W. 1128 (Minn).

"To this point of the investigation, therefore, the familiar maxim applies, 'Lex non intendit alliquid impossibile.' The reason of the law in such cases should prevail over its letter and general terms should be so limited in their application as not to lead injustice, oppression or an absurd consequence, the presumption being indulged that the lawmakers intended exceptions to language which otherwise would lead to such anomalous results."

U. S. v. Kirby, 7 Wall. 482;
People v. McRoberts, 62 Ill. 38;
Fusz v. Spaunhorst, 67 Mo. 256;
St. Louis & S. F. Ry. Co. v. Evens & Howard Brick Co., 85 Mo. 307-329.

"If, then, it is impossible to comply with the condition, the impossible condition must be regarded as not intended as to this class of laborers; or if intended, it must be void. The law requires nothing impossible —Lex non cogit ad impossibilia (Bouv. Law Dict.,

'Maxims', Broom, Max. 242), and Lex non intendit aliquid impossibile (Bouv. Law Dict.)—the law intends not anything impossible—are among the most venerable maxims of the law. In a statute, 'No text imposing obligations is understood to demand impossible things' (Sedg. St. Law 191). 'Provisions in acts of Parliament are to be expounded according to the ordinary sense of the words, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to, the declared or implied intention of the framer of the law, in which case the grammatical sense of the words may be modified, restricted, or extended to meet the plain policy and provision of the act' (Dwarris' St. 582). The rule is to construe words 'in their ordinary sense, unless it would lead to absurdity or manifest injustice; and if it should so vary them as to avoid that which certainly could not have been the intention of the Legislature, we must put a reasonable construction upon the words' (Id. 587). (See Donaldson v. Wood, 22 Wend. 399; Lake Shore Ry. Co. v. Roach, 80 N. Y. 339.) 'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over the letter' (U. S. v. Kirby, 7 Wall. 486). 'In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. * * * To require a heavy and almost impossible condition to the exercise of this right, with the alternative of payment of a small sum of money, is, in effect, to demand payment of that sum' (Henderson v. Mayor of New York, 92 U. S. 268)."

In re Leong Yick Dew, 19 Fed. Rep. 490-495.

In the case of Briggs v. Spaulding, 141 U. S. 132, this Court says on page 155 of the opinion:

> "Charles T. Coit had been the first cashier of the bank and was elected a director in 1870. He was its president from June, 1879, to the date of his death, December 11, 1881. On October 3, 1881, a meeting of the board of directors was held, at which Charles T. Coit, Francis E. Coit, Vought and Lee were present. Cushing, who had resigned on the 24th of September, was absent. It appears that at this meeting a resolution was adopted giving Charles T. Coit, the president, a leave of absence, on account of ill health, for one year. No one was elected president prior to January 10, 1882, in his place. There is no doubt of the severity of his illness, and the necessity for his absence; but it is contended that the resolution referred to absence as president and not as director, and that no power existed to allow leave of absence to a member of the board, and so that the resolution should be limited to excuse him from attendance at the bank, but not to permit him to leave the city; and it is said that if he wished to be absolved from responsibility while absent in search of restored health, he should have resigned. If such were the rule, we apprehend that moneyed corporations would find extreme difficulty in obtaining proper persons to act as directors. But it is not the rule. Mr. Coit was guilty of no want of ordinary care in acting upon the leave of absence, and is not to be held because he did not resign. Invalids are permitted to indulge in the hope of recovery, and are not called upon by reason of illness to retire at once from the affairs of this world and confine themselves to preparation for their passage into another. There was here no neglectful abandonment of duty from October 3 to December 11, and the decree in favor of the administrators of Charles T. Coit was properly rendered."

Section 9-163 of the Revised Statutes of Kansas for 1923, violates the Fourteenth Amendment to the Constitution of the United States, because it creates a conclusive presumption of knowledge on account of failure to examine.

Under this statute the liability is imposed upon a director not for failure to make an examination into the affairs of a bank, but for receiving or assenting to the reception of deposits when he knew that the bank was at the time insolvent—the liability being based upon assent to the reception of deposits when the person assenting knew the bank was insolvent. In order for a plaintiff to recover under this statute, he must prove, first, that the bank was insolvent at the time the deposit was made; second, that the director or party sought to be charged knew that it was insolvent; and, third, that knowing that it was insolvent he received or assented to the reception of the deposit. It provides that it shall be unlawful for an officer or director to assent to the reception of the deposit by his banking institution after he shall have knowledge of the fact that it is insolvent or in failing circumstances. It does not seek to impose liability upon an officer or director of a bank for failure to examine a bank, and, if it did, the officer or director charged would be excused if examination by him was impossible by reason of things beyond his control. But the statute does not seek to create any liability except where one assents when he has knowledge. Therefore, that portion of the statute which says that upon failure to discharge the duty of examining the bank, a director or officer shall, for the purpose of the act, be held to have knowledge of the insolvency of such bank or that it was in failing circumstances, as it was interpreted by the Supreme Court of this state and as claimed it should be interpreted in the brief of the

defendant in error, creates a conclusive presumption of knowledge. This is not within the power of the Legislature to do. The plaintiff in error in this case had a right to show that his decedent did not have knowledge that the bank was insolvent at the time of the reception of the deposits. This right was granted to each of the other directors and officers sued, because they had made examination, but it was denied to this plaintiff in error because the Court found that his decedent had not examined and that such failure to examine was because of his mental and physical condition which rendered him incapable of making an examination. As stated on pages 11 and 12 of the brief of the defendant in error on this motion, this statute as interpreted by our state Supreme Court means that an officer and director charged with a violation of a statute has the right to defense on the issue of insolvency or failing circumstances, but does not have the right to set up his ignorance occasioned by failure to discharge the duty imposed by statute as a defense against the liability thereof. Under this interpretation, an officer or director may examine the bank and may show that he did not have knowledge of the insolvent condition of the bank, while another officer and director is denied the right of showing that he did not have knowledge of the condition of the bank at the time the deposit in question was received by showing that at the time of the reception of the deposits and for many months prior thereto, he had been totally paralyzed, unable to exercise any of his body and mental faculties.

If this contention of the defendant in error is correct, if the position taken by the Supreme Court of the State of Kansas is correct, if the interpretation put upon this statute by the Supreme Court of the State of Kansas is correct, then no officer or director who fails to examine a

bank can ever show that he did not have knowledge of the insolvency of the bank. If one is an officer and director of a bank and the bank is perfectly solvent today and such officer and director becomes insane and, while insane, the bank becomes insolvent, such insane person, if he failed to examine the bank cannot be permitted to show that he did not examine because he was insane, but if by any chance he does make an examination of the bank, then he may show that he did not have knowledge of its condition because at the time he made the examination he was so insane that he could not discover the bank's condition. In these cases there was no dispute in the testimony as to the physical and mental condition of T. A. Kramer; but, because he did not examine while in this condition, he was, by the decision of the state Supreme Court, precluded from showing any set of facts which showed that he did not have knowledge that the bank was insolvent, and because he did not examine into the affairs of the bank the state Supreme Court held that the trial court could not take into consideration any facts or circumstances which might tend to show he did not have knowledge. In other words, because he failed to examine the door was shut against him on the question of knowledge. If this decision stands, a trial court is bound to say, in all cases that may hereafter come before it, to a director who did not examine:

> "It is true that nine months before the deposit was made you examined the bank and you did not find it to be insolvent and did not know it was insolvent, but you were immediately taken seriously sick, and that sickness was of such a nature as to render you incapable, mentally and physically, of making any examination into the affairs of the bank or of learning anything about its condition, yet I must hold you to

> have had knowledge of the insolvent condition of the bank, because you failed to examine, for the Supreme Court says that the statute in question means that if you have so failed, even though such failure was caused by an act of God, or by causes entirely without your control, you are still conclusively bound by such failure to have knowledge."

Under this statute there can be no recovery unless the parties suing establish that the director or officer sued had knowledge of the insolvent condition of the bank when he assented to the reception of the deposit. The action is not an action on contract, but it is in the nature of an action sounding in tort. If knowledge is an essential thing to prove in order to recover under this statute, then want of knowledge is an essential thing for an officer or director to establish in order to escape liability, and if established the result is that he escapes liability; therefore, knowledge and want of knowing being facts to be established, it is not within the power of the Legislature to make any fact conclusive of the ultimate fact to be established. To do so is for the Legislature to infringe on the rights of the Court and to try a case by legislative enactment. It has been repeatedly held that it is not within the power of the Legislature to create a conclusive presumption.

The Supreme Court of Kansas held that a statute which made the specification of weights in bills of lading issued by railroad companies for hay, etc., shipped over their lines, conclusive evidence of the correctness of such weight was unconstitutional, because denying to the companies due process of law and because wrongfully depriving the courts of the judicial power to determine the weight and sufficiency of evidence.

Railroad Company v. Simonson, 64 Kan. 802.

The Supreme Court of Arkansas held in Railway Co. v. Payne, 83 Ark. 816, 34 Am. Rep. 55, that

> "the Legislature cannot prescribe a rule of conclusive evidence."

In Cairo Railroad Company v. Parks, 32 Ark. 131, the Court said:

> "The Legislature may declare what shall be received as evidence, but it cannot make that conclusively true which may be shown to be false; that all events if such facts are necessary to show that the substantial rights of property are to be effected and he is made to lose his property."

In Meyer v. Berlandi, 39 Minn. 438, 12 Am. St. Rep. 663, 40 N. W. 513, it was said:

> "A man cannot be thus deprived of his property without his consent. The Legislature may doubtless establish rules of evidence; but to enact a law making evidence conclusive which is not so necessarily in and of itself, and thus preclude a party from showing the truth, would be nothing short of confiscation of property and a destruction of vested rights without due process of law."

In Cooley on Constitutional Limitations (5th Ed. 453), it is said:

> "But there are mixed bounds to the power of the Legislature over this subject which cannot be exceeded. As to what shall be evidence, and which party shall assume the burden of proof in civil cases, its authority is practically unrestricted, so long as its regulations are impartial and uniform; but it has no power to establish rules which, under pretense of

regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights."

In Railroad Company v. Turnipseed, 219 U. S. 35, Justice Lurton, in the opinion, says:

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

"If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

In Luria v. United States, 231 U. S. 9, 58 L. Ed. 101, it was held:

"Constitutional rights are not invaded by the declaration of Section 15 of the Naturalization Act of June 29, 1906, that taking up a permanent residence in a foreign country within five years after the issuance of a certificate of citizenship shall be considered prima facie evidence of the lack of intention to become a permanent citizen of the United States at the time of the application for citizenship, which, in the

absence of countervailing evidence, shall be sufficient to warrant the cancellation of the certificate as fraudulent, since this provision prescribed a rule of evidence, not of substantive right."

In Railroad v. Turnipseed, 219 U. S. 35, supra, it is said:

"The law of evidence is full of presumptions either of fact or law. The former are, of course, disputable and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded."

To the same effect was the holding in Yee Hem v. U. S., 219; it was said:

"A constitutional prohibition cannot be transgressed indirectly by creating a statutory presumption any more than by direct enactment."

In Zeigler v. Railroad Company, 58 Ala. 599, it was said:

"Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, in its most comprehensive sense; to be heard by testimony or otherwise; and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact, or liability be conclusively presumed against him, this is not due process of law."

In 6 R. C. L. 453, it is said:

"Due process of law clearly implies the right of the person affected thereby to be present before the tribunal which pronounces judgment concerning his life, liberty or property to be heard by testimony or other-

wise and to have the right of controverting by proof every material fact which bears upon the question or right in the matter involved."

In Larson v. Dickey, 42 Am. Rep. 595, page 606 of the opinion, it is said:

"We apprehend that it is beyond the power of the Legislature to restrain a defendant in any suit from setting up a defense to an action against him. Due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity when in court to establish any fact which according to the usages of the common law or provisions of the Constitution would be a protection to his property."

In 6 R. C. L. 462, it is said, speaking of the power of the Legislature:

"As to what shall be evidence and who shall assume the burden of proof, its power is unrestricted so long as its rules are impartial and uniform; but it has no power to establish rules which, under pretense of regulating evidence, altogether prohibit a party from exhibiting his rights, since this would substantially deprive him of due process of law. A conclusive presumption cannot be established which would overrule the essential facts and thereby preclude a party from asserting the truth."

In Vega S. S. Company v. Elevator Company, 74 Am. St. Rep., page 484, it was said on page 486:

"But is it competent for the Legislature to make the weight thus ascertained absolutely conclusive? We are of the opinion that it is not. The Legislature cannot in this manner provide for the arbitrary exercise of power, so as to deprive a person of his day in court

to vindicate his rights. And the law which closes his mouth absolutely when he comes into court is the same, in effect, as the law which deprives him of his day in court. (See Cooley's Constitutional Limitations, 6th Ed., 452; 6 Am. & Eng. Ency. of Law, 2d Ed., 1050; Graves v. Northern Pac. R. R. Co., 5 Mont. 556, 51 Am. Rep. 81; Johns v. State, 55 Md. 350; Wantlan v. White, 19 Ind. 470)."

The statute in question was originally before the Supreme Court of Kansas on an appeal in these cases from the District Court of Butler County from a judgment sustaining a demurrer to the defendant's defense that the statute was unconstitutional as in violation of the Fourteenth Amendment to the Constitution of the United States, in that it deprived the defendants of property without due process of law and denied to them equal protection of the law, and the Court held:

"In the statute (R. S. 9-163, 9-164) fixing liability of officers and directors for the unlawful reception of deposits by an insolvent bank under their control neither the due-process clause of the Federal Constitution nor the state constitutional guaranty of the right to a jury trial is violated by the statutory declaration that, upon failure of any officer or director to examine the bank, he shall be held to have had knowledge of the insolvency of the bank or that it was in failing condition at the time the deposits were unlawfully received by the bank."

On page 848 of the opinion it is said:

"Is this imposition of liability for negligence and official delinquency at odds with the Fourteenth Amendment? Defendants so contend; they cite texts and authorities, including our own cases, like Railway Company v. Simonson, 64 Kan. 802, 70 Pac. 881,

and Petersilie v. McLachlin, 80 Kan. 176, 101 Pac. 1014, to the effect that due process of law is denied by a statutory declaration that such and such facts shall be conclusive proof of something required to be established in a judicial proceeding when such facts are not of such inherently probative character. With this general doctrine of the cases relied on there need be no quarrel; certainly this Court has no disposition to disturb legal principles of such fundamental worth (12 C. J. 1234; 6 R. C. L. 462; 2 Wigmore on Evidence, 2nd Ed., 1016, et seq.). But we cannot agree that the statutory provision under present scrutiny is justly subject to the criticism leveled against it. The provision reads. 'And upon failure of any such person (officer or director) to discharge such duty (to examine the bank) he shall, for the purpose of this act, be held to have had knowledge of the insolvency of such bank, or that it was in failing circumstances.' This is not an arbitrary edict of the Legislature making evidence out of facts which are without inherent evidential significance, nor an arbitrary perversion of the rules of evidence. It is rather a statutory declaration of substantive law. We have many such rules of substantive law touching civil liability. Analogous liabilities are imposed by substantive law, even where there is little or no element of actual wrongdoing or negligence on the part of those subjected thereto. Such is the plight of stockholders of an insolvent bank. So, too, a business partner is liable as a matter of law for many acts and delects that may have been committed without his knowledge or assent, and even in violation of his wishes and instructions. Nothing is more common than the imposition of liability upon a principal for the acts, contracts or torts of his agent when done under color of his agency, although the principal may have been in no sense morally culpable for such acts" (Ramsey Petroleum Co. v. Adams, 119 Kan. 841).

Neither state courts nor Legislatures, by giving a statute a particular name or by the use of a particular form of words, can take away the duty of this Court to consider its real nature and effect (Galveston H. & S. A. R. Co. v. Texas, 210 U. S. 217; Choctaw O. & G. T. Co. v. Harrison, 235 U. S. 292, 59 Law Ed. 234).

In support of the construction placed upon the statute in question by the Supreme Court of the State of Kansas, reliance is placed, and the decision largely based, upon the decision in Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. Ed. 552. The statute involved in that case provided that:

> "In all suits upon policies of insurance against loss or damage by fire hereafter issued or renewed the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein on said property; and in case of total loss of the property insured the measure of damage shall be the amount for which the same was insured, less whatever depreciation in value below the amount for which the property is insured the property may have sustained between the time of issuing the policy and the time of the loss, and the burden of proving such depreciation shall be upon the defendant."

In that case the Court recognized the inability of the Legislature to make an altimate question of fact conclusively proved by the proof of another fact. We have examined the authorities presented by the defendants in error in their motion to dismiss upon the first two grounds alleged and we have been unable to find anything that sustains the construction put upon this statute by the Supreme Court of Kansas as constitutional. The first line

of authorities cited are on the proposition that the business of banking, being impressed with a public interest, may be regulated by the state, and that the state may then take the business of banking under its control in so far as that business is conducted by banking corporations deriving their authority and existence from the state. With this general proposition we have no quarrel, but the power of the state to regulate banking business does not confer upon the state the power to deprive officers and directors of a banking corporation of property without due process of law, or to deny to them equal protection of the law, nor to pass legislation which prohibits such officers from having a right in actions against them to present evidence tending to show they are not liable.

The statute in question seeks to create a liability upon officers and directors of a bank where no such liability existed at common law. A reading of the sections involved shows that it was intended to impose liability upon officers and directors of a bank who should receive deposits or assent to the reception of deposits when they knew that the bank was insolvent or in failing circumstances. No liability is imposed upon one who fails to examine a bank, but the statute attempts to make a failure to examine a bank conclusive proof that the director knew at the time of the reception of the deposit in question that the bank was insolvent or in failing circumstances.

Under the interpretation put by the Supreme Court of Kansas upon Section 9-163 of the Revised Statutes of Kansas 1923, which interpretation is clearly set forth in the brief of the defendants in error on the motion to dismiss or affirm, such statute does not make a failure to

examine a bank prima facie evidence of knowledge, but makes it conclusive on the question of knowledge. In effect, it says to directors and officers who may be sued under the statute:

> "Under this statute all of you who received or assented to the reception of deposits by your bank when you knew your bank was insolvent or in failing circumstances are individually liable for all such deposits, and you who fail to examine your bank shall, for the purpose of this action, be held to have had knowledge that the bank was insolvent or in failing circumstances. It makes no difference what caused your failure to examine. You may have failed because you were during the period involved mentally incapacitated from making an examination. You may during the period involved have been confined to your bed by typhoid fever and in the delirium of typhoid fever. You may during the time involved have been lying unconscious from the effect of a paralytic stroke. During the period involved you may have been suffering intense physical pain and under the influence of opiates and unable to take any part in business affairs. Acts of God may have intervened to prevent you from making an examination into the affairs of the bank. However, these things will avail you nothing. You will not be permitted to show any of these things in order to show want of knowledge or for the purpose of showing that it was impossible for you to examine into the bank. The officers and directors who did make an examination will be permitted to show that they did not know that the bank was insolvent. They will be permitted to show that it was impossible from any examination of the bank to discover the condition of the bank. They will be permitted to put on expert witnesses to prove that no examination into the affairs of the

bank, however thorough, would have disclosed the condition of the bank and may establish that it was impossible for officers and directors of a bank by any examination made or by any inquiry made to have learned of the condition of the bank at the time the deposits were received. They may be able to prove these facts by an overwhelming preponderance of the evidence, and yet the jury under this statute must find that you did know the bank was insolvent or in failing circumstances, while at the same time finding that it was impossible for the officers and directors of a bank, by any examination or inquiry, to have learned the condition of the bank at the time the deposits were received."

Clearly this statute bases the right to recover upon the assent to the reception of deposits by an officer or director of a bank when he knew that the bank was insolvent and then makes proof of the failure to examine conclusive as to the ultimate fact of knowledge, thus creating a conclusive presumption of one fact by proof of another fact, and giving to the officer or director failing to examine no right to rebut such presumption or to introduce any evidence tending to prove that he did not have knowledge. This the Legislature cannot do and this construction put upon this statute by the State Supreme Court violates the Fourteenth Amendment to the Constitution of the United States by depriving the plaintiff in error of the right to show that his decedent did not know of the insolvent condition of the bank, and of showing that any failure on his part to examine was caused by act of God or by reason of things beyond his control.

There is no want of necessary parties as plaintiffs in error.

In defendants in error's motion it is said that the cause of action stated against this plaintiff in error is the same

cause of action as that stated against H. F. Ferry, C. L. King, A. B. Ewing and L. D. Hadley, and that the cause of action in each case is a joint cause of action, and all defendants against whom judgment was allowed are jointly liable for the full amount. It is true that the same matters are charged against each defendant in each petition, but this does not make the cause of action joint. The statute in question provides that "Every person violating the provisions of this section shall be individually responsible for such deposits so received." Instead of there being a joint responsibility, there is an individual responsibility. Each officer or director must examine or fail to examine for himself. Each officer or director must assent to the reception of deposits or fail to assent for himself. There cannot be any joint liability.

These suits are based upon a statutory liability, and it would require a separate suit as to each officer or director were it not for the further provisions of the statute involved that provide: "In all suits brought for the recovery of the amount of any deposits received or debts so created, all officers, agents or managers of any such banking institution, charged with having so assented to the reception of such deposit, or the creation of such debt, may be joined as defendants or proceeded against severally."

But the fact that the officers and directors are joined as defendants does not prevent the proceedings from being in fact a separate proceeding against each defendant, because in order to recover, although all officers and directors are joined as defendants, a separate and distinct liability must be shown as to each defendant. And that was the procedure followed in all these cases. Each plaintiff endeavored to show a distinct liability as to each

defendant. What one defendant did or failed to do was of no importance on the question of liability as to any other defendant.

In each case two defendants, E. F. Adams and G. W. Lyon, were clearly shown to be not liable, because neither of them was an officer or director of the bank at the time in question, and no complaint is made as to their not being parties. A separate verdict and a separate finding was rendered in each case as to each defendant. Each finding and each verdict as to this plaintiff in error was to the effect that he was not liable. Each finding and each verdict as to Messrs. Ferry, King, Ewing and Hadley was to the effect that they were liable and a separate and distinct judgment for the full amount was rendered in each case against Messrs. Ferry, King, Ewing and Hadley, and a separate judgment was rendered in each case adjudging that there was no liability as against this plaintiff in error.

From the judgment rendered in favor of this plaintiff in error and E. F. Adams, each plaintiff in the court below prosecuted an appeal to the Supreme Court of Kansas. From each judgment rendered against Messrs. Ferry, King and Hadley, they each appealed. Mr. Ewing is not a party to the proceedings in the State Supreme Court, and Mr. Lyon is not a party to those proceedings.

The judgment of the State Supreme Court in each case was that the judgment in favor of this plaintiff in error be reversed, with directions to the District Court to enter judgment for the full amount against this plaintiff in error. All the other judgments were affirmed. Consequently, each judgment in the lower court in E. F. Adams' favor was affirmed, and she could have no interest in our writ of error. When we prosecuted our writs of error the

plaintiff in each case was, of course, a person vitally interested. But as to all other persons our interest as to the reversal of our judgment was ours alone. The interest that Mr. Ferry had in the judgment of the Supreme Court of Kansas was to attempt to reverse that portion of that judgment that affirmed the judgment below against him; and Mr. King and Mr. Hadley each had a similar interest as to the judgments in the court below against each of them. We could not ask Mrs. Adams to join with us in our writ of error, because she desired no relief. We could not ask Mr. Ferry, or either of the other parties mentioned, to join with us in our writ of error, because if he asked relief it would not be with reference to the reversing of the judgment against this plaintiff in error, but it would be with reference to the affirmance of the judgments against him. Further than that, a separate answer was filed by each defendant in each case. We presented alone the defense that T. A. Kramer was mentally and physically unable to examine the bank during the time in question, and that, therefore, the statutory presumption should not apply to him. This defense was made in connection with the defense that the statutes in question violated the Fourteenth Amendment to the United States Constitution. And a similar defense was made by no other defendant.

In the case of Gilfillan v. McKee, 159 U. S. 303, were involved suits in equity by a number of persons, setting up their various claims upon a certain fund. The decree was that one-half of the special fund should be paid to McPherson, executor, and the other one-half to Gilfillan and his associates; that the general fund should be distributed among three parties; a certain amount was allowed to Lamon for his services, and the claims of the others were disallowed. McPherson, executor, appealed

from so much of the decree as denied him participation in the general fund. Gilfillan and others appealed from the decree distributing the general fund and dismissing their cross bill; and other parties appealed. On page 312 of the opinion it is said:

> "The decree was several, both in form and substance, and the interest represented by each defendant was separate and distinct from that of the other. In such case any party may appeal separately to protect his own interest."

In the case of Hanrick v. Patrick, 119 U. S. 156, it is held that the mere fact that the judgment is joint is not controlling; that a judgment may be joint in form but severable in fact and in law.

In the case of Germain v. Mason, 12 Wallace 259, a suit was brought against Germain to recover balance due for work in building a house, and to enforce a mechanic's lien against the house and land. Twenty other persons were made parties as having or claiming some interest in the premises. The Court gave judgment against Germain in personam for the debt, with an order, if it could not be made out of him, the real estate was to be sold, and decided that the complainant's lien was superior to the claims of the other parties. And it was held that the writ should not be dismissed; that Germain had a separate distinct personal judgment against him for money in which the other defendants had no interest, and that he had a right to prosecute a writ of error in his own name without joining them.

In the case of Cox et al. v. United States, 6 Peters 172, two writs of error were sued out. In the lower court judgment was given against the estate of John Dick and

Nathaniel Cox jointly and severally for $20,000.00 and against Nathaniel Dick and James Dick for $10,000.00. It was held that this was a joint and several judgment; that all the defendants did not need to join in one writ; that it was proper for the defendants to sue out separate writs.

In the case of Winters v. United States, 207 U. S. 564, on page 574 of the opinion, it is said:

> "The rule which requires the parties to a judgment or decree to join in an appeal or writ of error, or by detaching from the right by some proper proceeding, or by their renunciation, is firmly established. But the rule only applies to joint judgments or decrees. In other words, when the interest of a defendant is separate from that of other defendants he may appeal without them."

In the opinion it is further said that the bill does not distinguish the acts of the defendants. (The same cause of action was stated against each as claimed by defendants in error here.) It is further said that the answer to the bill is joint and several and in effect avers separate rights, interests and actions on the part of the defendants. (In our case the answers were separate and we set up a separate and distinct right and defense.)

In the opinion it is further said that whatever rights were asserted or omission or acts done by one defendant had no dependence upon or relation to the acts of any other defendant. (And the same is true in these cases.) It is further said, if trespassers at all, the defendants were separate trespassers. (And the same is true in our cases. If wrongdoers at all, the defendants were separate wrongdoers.)

And with reference to some of the defaulting defendants it is further said:

> "Their rights, therefore, were entirely different from those of appellants; they were naked trespassers, and conceded by their default the rights of the United States and the Indians, and were in no position to resist the prayer of the bill. But the appellants justified by counter rights and submitted those rights for judgment. There is nothing, therefore, in common between appellants and the other defendants. The motion to dismiss is denied and we proceed to the merits."

In the case of Alsop v. Conway et al., 188 Fed. 568 (C. C. A. 6th), on page 572 of the opinion, it is said:

> "A preliminary question arises upon the motion of the appellee to dismiss the appeal on the ground that the parties interested in the appeal are not before the Court or their presence dispensed with through summons and severance. The rule invoked by appellees relates only to joint judgments (citing authorities). That portion of the decree from which the appeal is taken is clearly several as to the defendant Alsop. It is true that such provision has the effect to deny the right of recovery by the bank and its receiver in the state court proceeding; but that does not make the judgment joint."

In the case of Hightower et al. vs. American National Bank of Macon, 276 Fed. 371 (C. C. A. 5th), there was a suit by the American National Bank of Macon against the Commercial National Bank of Macon and its shareholders. The decree adjudged the plaintiff a creditor with the right of enforcing the shareholders' liability, and Hightower and others appealed. It is not clear as to who the others

were, but they must have been shareholders; and it is not clear who were the parties that did not appeal, but they must have been shareholders, and on page 374 of the opinion it is said:

> "Appellee moves to dismiss the appeal upon the ground that several defendants, as to whom a severance has not been had, have not joined in it. The liability is several and not joint, and may be appealed from by one or more defendants without joining others."

In the case of Adamson et al. v. Black Rock P. & I. Co., 12 Fed. (2nd) 437 (C. C. A. 9th), on page 439 of the opinion, it is said:

> "But it is equally well settled that, when the interest of a defendant is separate from that of other defendants, he may appeal without them."

In the case of Love v. Export Storage Co. et al., 143 Fed. 1 (C. C. A. 6th), on page 11 of the opinion, it is said:

> "The rule firmly established in the Appellate Courts of the United States requiring all parties against whom a judgment or decree is rendered, in the absence of severance, to join in suing out a writ of error or prosecuting an appeal therefrom, has application only to a joint judgment or decree against such parties. It has no application to separate judgments or decrees against such parties, though rendered at the same time and contained in the same entry."

Most of the cases cited by defendants in error in their motion merely support the general rule that one party to a joint judgment or decree cannot appeal or prosecute a writ of error alone. The only cases that, in our opinion,

bear any similarity to the cases at bar are the cases of Hardee v. Wilson, 146 U. S. 179, and Wilson v. Kiesel, 164 U. S. 248. But we do not think either of those cases is an authority against our position.

In the Hardee case there was but one piece of land involved, and Hardee asked this Court to determine the legal effect of a deed signed by Minor and wife, and to determine the amount of a debt owed by them. He did not make Minor and wife parties, and it would seem to be clear that they should be made parties.

The case of Wilson v. Kiesel, supra, bears more resemblance to the case at bar, but we think that it is clearly distinguishable. In that case Wilson first recovered a large judgment against the power company. He then filed a bill against the power company and Kiesel, Anderson, Carnahan and many others as stockholders of the power company. Kiesel, Anderson and Carnahan filed a cross-complaint, alleging that the judgment against the power company was fraudulent. About twenty-two other defendants filed their answers to the complaint. The case was first heard on appeal in the Supreme Court of the Territory of Utah, and that Court held that the judgment obtained by Wilson against the power company was not conclusive on the subscribers to its capital stock; that this judgment ought to have been reduced very much and would have to be reversed in order to afford the subscribers an opportunity to test the validity of Wilson's claim; that Wilson was not the real party in interest at the beginning of the action and could not maintain the action in his own name. That Court, so concluding, of course affirmed the judgment in favor of Kiesel, Carnahan and Anderson, reversed the judgment as to all other defendants, and directed the lower court to dismiss the bill. From this judgment Wilson appealed

to this court, making Kiesel, Carnahan and Anderson appellees. This Court said that the appeal must be dismissed for want of proper parties because of the cross complaint, and that all of the other defendants were directly and vitally interested in the disposition of the cross complaint. There was not only the cross complaint, but Wilson was the appellant in this court; he was the complainant in the trial court. He made all of the defendants parties to his suit in the trial court. When the case reached the Territorial Supreme Court it was disposed of, as this Court says, on a common ground. Not that Kiesel, Carnahan or Anderson had paid, but on the ground common to all that Wilson could not maintain the suit against any of the defendants. It seems to us that that having been the decision, Wilson clearly could not make three defendants a party to his appeal, nor four, nor five, nor any number less than all.

We submit that that case is clearly distinguishable from the case at bar, and that one of the important points of difference is that the appeal to this court was prosecuted by the complainant in the court below, and that the situation under that record is not the same as it would have been had the decision of the Territorial Supreme Court been adverse to the defendants, and Kiesel, Carnahan and Anderson had attempted to appeal.

It seems to us that the defendants in error in their motion, themselves, answer their own contention as to necessary parties as plaintiffs in error, when they say:

> "A reversal herein would add largely to the burden of the defendants not joined as plaintiffs in error, placing upon them the entire burden of the judgments and relieving the plaintiff in error therefrom."

If that contention be correct, then certainly neither Mr. Ferry, nor Mr. King nor Mr. Hadley, would join in our writ of error. Their interests would be that we fail to show that the judgment of the Supreme Court of Kansas as to us is erroneous; their interests would be to see that the judgment of the Supreme Court of Kansas, reversing the judgments in favor of this plaintiff in error, were sustained. And their interests being opposed to us, that they should have been made defendants in error to our writs, as was done.

We respectfully submit that in these cases there was drawn in question the validity of Sections 9-163 and 9-164 of the Statutes of the State of Kansas, on the ground that each section is repugant to the Constitution of the United States, and the decision of the highest court of that state was in favor of the validity of each of said statutes. That the serious illness of this plaintiff in error's decedent from August, 1922, to the time of his death in July, 1923, with the deposits being made and the closing of the bank having occurred in March, 1923, place this plaintiff in error in an especially favorable position to raise the question of the constitutionality of these statutes. That the question was raised at the first opportunity and kept in the cases throughout the litigation. That the mere fact that this plaintiff in error's decedent executed the oath as director and made a codicil to his will when he was seriously ill five hundred miles from the bank, does not show that he was able to examine the bank or that he kept in touch with its affairs. That under the authority of Briggs v. Spaulding, 141 U. S. 132, it was not shown that this plaintiff in error's decedent violated his duty. That section 9-164 is regugnant to the Fourteenth Amendment to the Constitution of the United States, be-

cause it made proof of the insolvency of the bank prima facie evidence of this plaintiff in error's decedent's assent to the reception of the deposits in question. That section 9-163 is repugnant to the Fourteenth Amendment to the Constitution of the United States because it made this plaintiff in error's decedent's failure to examine the bank, at a time when it was impossible for him to examine the bank, conclusive proof of his knowledge of the insolvent condition of the bank. That there is no lack of proper parties plaintiff in error in these cases, and that this motion should be overruled.

Respectfully submitted,

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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1927.

H. F. FERRY,
Plaintiff in Error,
vs.
ALICE M. RAMSEY et al.,
Defendants in Error.
No. 407.

C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED,
Plaintiff in Error,
vs.
ALICE M. RAMSEY, C. L. KING, H. F. FERRY and L. D. HADLEY,
Defendants in Error.
No. 408.

H. F. FERRY,
Plaintiff in Error,
vs.
W. O. JAMES, C. L. KING and L. D. HADLEY,
Defendants in Error.
No. 409.

C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED,
Plaintiff in Error,
vs.
W. O. JAMES, C. L. KING, H. F. FERRY and L. D. HADLEY,
Defendants in Error.
No. 410.

H. F. FERRY,
Plaintiff in Error,
vs.
RAMSEY PETROLEUM COMPANY, C. L. KING, L. D. HADLEY et al.,
Defendants in Error.
No. 411.

C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED,
Plaintiff in Error,
vs.
RAMSEY PETROLEUM COMPANY, C. L. KING, H. F. FERRY and L. D. HADLEY,
Defendants in Error.
No. 412.

H. F. FERRY,
Plaintiff in Error,
vs.
G. L. RAMSEY, C. L. KING et al.,
Defendants in Error.
No. 413.

C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED,
Plaintiff in Error,
vs.
G. L. RAMSEY, C. L. KING, H. F. FERRY and L. D. HADLEY,
Defendants in Error.
No. 414.

H. F. FERRY,
Plaintiff in Error,
vs.
M. R. CHASTAIN, C. L. KING, L. D. HADLEY et al.,
Defendants in Error.
No. 415.

C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED,
Plaintiff in Error,
vs.
M. R. CHASTAIN, C. L. KING, H. F. FERRY and L. D. HADLEY,
Defendants in Error.
No. 416.

H. F. FERRY,
Plaintiff in Error,
vs.
A. E. LLOYD, C. L. KING and L. D. HADLEY,
Defendants in Error.
No. 417.

C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED,
Plaintiff in Error,
vs.
A. E. LLOYD, C. L. KING, H. F. FERRY and L. D. HADLEY,
Defendants in Error.
No. 418.

In Error to the Supreme Court of the State of Kansas.

BRIEF OF C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED, PLAINTIFF IN ERROR IN NOS. 407, 409, 411, 413, 415 AND 417.

The opinion of the Supreme Court of the State of Kansas in Cases Nos. 411, 412, 413 and 414 is reported in 122 Kansas, p. 675, and the opinion of the Supreme Court of the State of Kansas in Cases Nos. 407, 408, 409, 410, 415, 416, 417 and 418 is reported in 122 Kansas, p. 691.

STATEMENT ON CONSOLIDATION.

Each of the defendants in error, G. L. Ramsey, The Ramsey Petroleum Company, M. R. Chastain, A. E. Lloyd, Alice M. Ramsey and W. O. James, commenced an action in the District Court of Butler County, Kansas, to recover deposits alleged to have been made in The Butler County State Bank, the actions being brought under Sections 9-163 and 9-164, R. S. 1923, as is more fully set out under the next heading, "Statement on Jurisdiction." They were as follows:

G. L. Ramsey commenced an action against C. L. King, H. F. Ferry, L. D. Hadley, A. B. Ewing, G. W. Lyon, E. F. Adams and C. L. Harris as executor of the last will and testament of T. A. Kramer, deceased, to recover the sum of $22,726.16.

The Ramsey Petroleum Company brought the same kind of action against the same defendants to recover the sum of $27,211.96.

M. R. Chastain brought the same kind of action against the same defendants to recover the sum of $1,429.94.

A. E. Lloyd brought the same kind of action against the same defendants to recover the sum of $915.77.

Alice M. Ramsey brought the same kind of action against the same defendants to recover the sum of $7,063.67.

W. O. James brought the same kind of action against the same defendants to recover the sum of $7,819.72.

In all cases the pleadings of all parties were the same, except the names of the plaintiff and the amount claimed.

The case brought by G. L. Ramsey was tried before a jury and a separate verdict was returned as to each of the defendants except the defendants Lyon and Adams, in whose favor demurrers to the evidence were sustained (R. Nos. 407 and 408, pp. 330-331), and as to whom no formal verdicts were returned. A separate judgment was rendered in favor of the plaintiff and against each of the defendants C. L. King, H. F. Ferry, A. B. Ewing and L. D. Hadley on the verdicts returned against them. On the verdict returned in favor of this plaintiff in error a separate judgment was rendered in favor of him and against G. L. Ramsey in bar of the action (R. Nos. 407 and 408, pp. 335-337). G. L. Ramsey appealed to the Supreme Court of the State of Kansas from the judgment rendered against him in favor of this plaintiff in error, and from the judgment sustaining the demurrer to the evidence as to E. F. Adams. He made no one a party to this appeal except this plaintiff in error and E. F. Adams. This case was docketed separately in the Supreme Court of the State of Kansas. Afterwards C. L. King, H. F. Ferry and L. D. Hadley appealed from the judgments rendered against them in favor of G. L. Ramsey.

A transcript of the testimony in the G. L. Ramsey case was made, and each of the other cases mentioned above was tried before the Court without a jury under a stipulation that the transcript of the testimony in the G. L.

Ramsey case should be considered as the evidence in each of those cases with the additional evidence as to the amount of the deposit claimed by each plaintiff.

The case brought by The Ramsey Petroleum Company was the next case tried after the G. L. Ramsey case, and the Court found the facts against the defendants, King, Ferry, Ewing and Hadley, and found the facts in favor of this plaintiff in error. The Court made a separate finding as to this plaintiff in error (R. Nos. 407 and 408, p. 340). Separate judgments were rendered in favor of The Ramsey Petroleum Company against each of the defendants C. L. King, A. B. Ewing, H. F. Ferry and L. D. Hadley. A separate judgment was rendered in favor of this plaintiff in error against the said The Ramsey Petroleum Company (R. Nos. 407 and 408, p. 340). Demurrers to the evidence were again sustained in favor of Adams and Lyon.

The Ramsey Petroleum Company appealed from the judgments rendered against it in favor of E. F. Adams and this plaintiff in error. Such appeal was docketed separately in the Supreme Court of the State of Kansas as case No. 27,213. C. L. King and H. F. Ferry appealed from the separate judgments rendered against them and this case was docketed as case No. 27,217. L. D. Hadley appealed from the separate judgment rendered against him in favor of The Ramsey Petroleum Company, and this case was docketed separately as case No. 27,230. The Ramsey Petroleum Company in its appeals made no one parties except E. F. Adams and this plaintiff in error.

It having been called to the attention of the Supreme Court of the State of Kansas that these cases each presented the same question, they were ordered consolidated for hearing, and the appellants G. L. Ramsey and The Ramsey Petroleum Company were granted permission

to file one abstract which appears in this record as the abstract in case No. 27,109 in the Supreme Court of Kansas, and is found in R. Nos. 407 and 408, pp. 1 to 367, inclusive. The opinion of the Supreme Court of Kansas is found in 122 Kan. 675.

And that Court entered a judgment in each case affirming the judgments in favor of E. F. Adams and the respective judgments against C. L. King, H. F. Ferry and L. D. Hadley, reversing the judgment in favor of this plaintiff in error, and remanded the cases with instructions to render a judgment in favor of each plaintiff in the court below and against this plaintiff in error.

The cases brought by M. R. Chastain, A. E. Lloyd, Alice M. Ramsey and W. O. James were afterwards tried. The trial court in each of these cases found in favor of the plaintiffs and against the defendants King, Ferry, Hadley and Ewing, and sustained demurrers to the evidence as to E. F. Adams and Lyon, and in each case made a separate finding in favor of this plaintiff in error, the findings being identical with the findings made in the case of The Ramsey Petroleum Company, as set out in R. Nos. 407 and 408, p. 340. Separate judgments were rendered in each of these cases in favor of the plaintiff and against King, Ewing, Hadley and Ferry. The judgments were identical except as to amounts with the judgments rendered in the case of The Ramsey Petroleum Company (R. Nos. 407 and 408, pp. 340-341). Judgment was rendered in each of these cases in favor of this plaintiff in error and against the respective plaintiffs, which was in each case identical with the judgment rendered in the case of The Ramsey Petroleum Company (R. Nos. 407 and 408, p. 340).

W. O. James appealed to the Supreme Court of the State of Kansas from the judgment rendered against him in

favor of this plaintiff in error, and from the order sustaining the demurrer to the evidence as to E. F. Adams. No other persons were made parties to this appeal. C. L. King, H. F. Ferry and L. D. Hadley appealed from the judgments rendered against each of them and in favor of W. O. James. These cases were docketed in the Supreme Court as case No. 27,395.

A. E. Lloyd appealed from the judgment rendered against him in favor of this plaintiff in error and from the judgment sustaining the demurrer to the evidence as to E. F. Adams. No other persons were made parties to this appeal. C. L. King, H. F. Ferry and L. D. Hadley appealed to the Supreme Court of the State of Kansas from the judgments rendered against each of them and in favor of A. E. Lloyd.

Alice M. Ramsey appealed from the judgment rendered against her in favor of this plaintiff in error and from the judgment sustaining the demurrer to her evidence as to E. F. Adams. No other parties were made parties to this appeal. C. L. King, H. F. Ferry and L. D. Hadley appealed from the judgments rendered against each of them and in favor of Alice M. Ramsey.

M. R. Chastain appealed from the judgment rendered against her and in favor of this plaintiff in error and from the judgment sustaining the demurrer to her evidence as against E. F. Adams. C. L. King, H. F. Ferry and L. D. Hadley appealed from the judgments rendered against each of them and in favor of M. R. Chastain.

The appeals in the G. L. Ramsey case and The Ramsey Petroleum Company case came on for hearing in the Supreme Court of the State of Kansas, and the Court thereupon ordered the appeals in the James case, the Lloyd case, the Alice M. Ramsey case and the M. R. Chastain

case to be submitted on the same argument and briefs and upon the same abstract made and filed in the G. L. Ramsey case and The Ramsey Petroleum Company case. The Court rendered a memoranda decision in these last cases and entered a judgment in each affirming the judgments in favor of E. F. Adams and the respective judgments against C. L. King, H. F. Ferry and L. D. Hadley, and reversing the judgments in favor of this plaintiff in error, and remanded these cases with instructions to render a judgment in favor of each plaintiff in the court below against this plaintiff in error.

Thus it will be seen that the same question is involved in each of these cases. The pleadings of each of the parties to the suits and the evidence in each of the suits are the same, except as to the names of the different plaintiffs and the amount claimed. There is no difference in the verdicts, findings and judgments in the different cases in the trial court, except as to the names of the plaintiffs and the amounts. There is no difference in the appeals to the Supreme Court of Kansas, except as to the names of the appellants and the same judgment was rendered by the Supreme Court of Kansas in each of the cases.

From the judgment of the Supreme Court of the State of Kansas in the G. L. Ramsey case reversing the judgment of the court below in favor of this plaintiff in error, this plaintiff in error is prosecuting a writ of error to this Court. He is also prosecuting a like writ of error from the like judgments of the Supreme Court of Kansas rendered against him in each of the other cases, to wit, The Ramsey Petroleum Company case, the W. O. James case, the A. E. Lloyd case, the Alice M. Ramsey case and the M. R. Chastain case.

The record in the Supreme Court of the State of Kansas in these various cases, setting out the testimony and the opinions of the Supreme Court in all of the cases and the judgments rendered in the G. L. Ramsey case and The Ramsey Petroleum Company case, are all printed in R. Nos. 407 and 408, pp. 1 to 369, inclusive.

An order of consolidation and with reference to printing was made by the Supreme Court of the United States, consolidating cases 407 to 418, inclusive (R. Nos. 407 and 408, p. 396; R. Nos. 409 and 410, p. 26; R. Nos. 411 and 412, p. 26; R. Nos. 413 and 414, p. 26; R. Nos. 415 and 416, p. 25; R. Nos. 417 and 418, p. 25).

Under this order the cases were consolidated for hearing with directions to print the whole record in two of the cases and only so much of the record in the remaining cases as was necessary to show the difference between the cases, and a praecipe in accordance with this order was filed with the Clerk of the Supreme Court for the printing of the record (R. Nos. 407 and 408, p. 395).

The writs of error prosecuted by C. L. Harris, as executor, were docketed in this court and appear as cases numbered 408, 410, 412, 414, 416 and 418.

H. F. Ferry prosecuted separate writs of error from this court to the Supreme Court of the State of Kansas on the judgments rendered against him and these cases are docketed in this court as Nos. 407, 409, 411, 413, 415 and 417.

STATEMENT ON JURISDICTION.

The date of the judgment of the Supreme Court of Kansas in each of the cases is February 12, 1927 (R. in 407, 408, p. 347; R. in 409, 410, p. 1; R. in 411, 412, p. 2; R. in 413, 414, p. 2; R. in 415, 416, p. 1; R. in 417, 418, p. 1).

Petitions for rehearing were denied in each of the cases April 16, 1927 (R. in 407, 408, p. 369; R. in 409, 410, p. 1; R. in 411, 412, p. 2; R. in 413, 414, p. 2; R. in 415, 416, p. 1; R. in 417, 418, p. 1).

Each of the defendants in error, Alice M. Ramsey, W. O. James, the Ramsey Petroleum Company, G. L. Ramsey, M. R. Chastain and A. E. Lloyd, was a depositor in the Butler County State Bank, located at Eldorado, Kansas. C. L. King was president and a director of the bank; H. F. Ferry was cashier and a director; A. B. Ewing, L. D. Hadley and T. A. Kramer were directors of the bank. The State Bank Commissioner took charge of the bank March 30, 1923. Shortly thereafter each of the above-named defendants in error commenced a suit against the said officers and directors and also against E. F. Adams and G. W. Lyons to recover the balance to his credit in said bank. The petitions in each of the suits were exactly the same, except as to the name of the plaintiff and the amount claimed. Each suit was based on the following provisions of the Statutes of the State of Kansas:

> "9-163. Transactions During Insolvency.—It shall be unlawful for any president, director, manager, cashier, or other officer of any banking institution, to assent to the reception of deposits or the creation of debts by such banking institution after he shall have

had knowledge of the fact that it is insolvent or in failing circumstances; and it is hereby made the duty of every such officer, agent or manager of such banking institution to examine into the affairs of the same and, if possible, know its condition. And upon failure of any such person to discharge such duty he shall, for the purpose of this act, be held to have had knowledge of the insolvency of such bank, or that it was in failing circumstances. Every person violating the provisions of this section shall be individually responsible for such deposits so received and all such debts so contracted: Provided, any director who may have paid more than his share of the liabilities mentioned in this section may have the proper remedy at law against such other persons as shall not have paid their full share of such liabilities."

"9-164. Proceedings Under Foregoing Section.—In all suits brought for the recovery of the amount of any deposits received or debt so created, all officers, agents or managers of any such banking institutions, charged with having so assented to the reception of such deposit or the creation of such debt, may be joined as defendants or proceeded against severally; and the fact that such banking institution was so insolvent or in failing circumstances at the time of the reception of the deposit charged to have been so received, or the creation of the debt charged to have been so created, shall be prima facie evidence of such knowledge and assent to such deposit or creation of such debt on the part of such officer, agent or manager so charged therewith."

Each defendant in each suit filed a separate answer. In each answer of this plaintiff in error he alleged that the above-mentioned sections of the Revised Statutes of Kansas for 1923 were unconstitutional and in violation of the

Fourteenth Amendment to the Constitution of the United States (R. in 407, 408, p. 31).

In each answer this plaintiff in error set forth the physical and mental incapacity of T. A. Kramer, his decedent, during all of the time in question in the suits (R. 407 and 408, pp. 26 to 29).

Demurrers were sustained to the allegations of the answers alleging the unconstitutionality of these statutes (R. in 407, 408, p. 456).

An appeal was taken to the Supreme Court of the State of Kansas from the ruling of the Court sustaining these demurrers, and the action of the lower court was sustained (Ramsey Petroleum Company v. E. F. Adams et al., 119 Kans. 844, 241 Pac. 433).

Upon the trial this plaintiff in error objected to the introduction of any evidence because of the unconstitutionality of said statutes (R. in 407 and 408, pp. 89, 90).

Upon the trial the evidence showed that T. A. Kramer during all of the time in question was physically and mentally incapacitated to transact any business; that he became seriously ill in Boston in August, 1922; that after remaining there for some time in a hospital he was taken to East St. Louis, Illinois; that he was unable to leave East St. Louis, but remained there until he died, in July, 1923, and, of course, during said time did not examine into the affairs of the bank (R. in 407, 408, pp. 221, 234-242).

The evidence also showed that E. F. Adams and G. W. Lyons were not directors of the bank at any of the times in question, and the Court sustained a demurrer to the evidence as to them in each of the cases on this ground.

A separate verdict was returned by the jury as to each defendant in the case tried to the jury (R. in 407, 408, p.

330), and a separate finding was made by the Court as to each defendant in the cases tried by the Court (R. in 407, 408, pp. 339 and 340).

A separate judgment was rendered in each case as to each defendant. A judgment was rendered against C. L. King for the full amount claimed in each case and a like judgment against H. F. Ferry, L. D. Hadley and A. B. Ewing, and a judgment was rendered in each case in favor of this plaintiff in error and against the plaintiff in each case (R. Nos. 407, 408, pp. 335, 336, 337, 340 and 341).

From each judgment in favor of this plaintiff in error each respective plaintiff in the court below prosecuted an appeal to the Supreme Court of the State of Kansas, and from each judgment in favor of the plaintiff and against C. L. King, H. F. Ferry and L. D. Hadley they each appealed to the Supreme Court of the State of Kansas.

In each of the appeals of the said plaintiffs against this plaintiff in error, this plaintiff in error again contended that each of the statutes above mentioned was unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States. This contention was taken up, discussed and decided by the Supreme Court of the State of Kansas, and each of said statutes was held to be valid and not in violation of the Fourteenth Amendment to the Constitution of the United States, and it was further held that under the provisions of said section 9-163, T. A. Kramer's representative was prohibited from showing any reason or excuse why said T. A. Kramer had not made an examination of the bank, and the Court held that T. A. Kramer was conclusively held to have had knowledge of the insolvent condition of the bank, because of his failure to examine (R. in 407, 408, p. 348).

The Supreme Court affirmed the judgment in favor of E. F. Adams in each case and affirmed each of the judg-

ments against C. L. King, H. F. Ferry and L. D. Hadley and reversed the judgments in favor of this plaintiff in error with directions to the lower court to enter judgment in each case against this plaintiff in error for the amounts claimed to be due by the plaintiffs below.

Jurisdiction of this Court is invoked under the provisions of paragraph (a) of Section 237 of the Judicial Code, United States Code, Title 28, Sec. 344.

The following decisions sustain the jurisdiction of this Court to review the judgment below:

Commonwealth Bank of Ky. v. Griffith, 14 Pet. 56, 39 U. S. 55;
Merchants Natl. Bank v. City of Richmond, 256 U. S. 635, 65 L. Ed. 1135.

STATEMENT.

All of the above actions were brought in the District Court of Butler County, Kansas, to recover of the officers and directors of the Butler County State Bank on account of deposits made by the different plaintiffs in the month of March, 1923, a time when it was claimed the bank was in an insolvent condition and so known to be to such officers and directors.

The parties sued in each case were C. L. King, H. F. Ferry, L. D. Hadley, A. B. Ewing, E. F. Adams, G. W. Lyon and this plaintiff in error. In each of the cases the Court, at the close of the plaintiff's testimony, sustained demurrers as to Lyon and Adams on the ground that the evidence showed they were not officers or directors of the bank at the time of the reception of the deposits in question.

The case brought by G. L. Ramsey was tried to a jury and the Court submitted separate verdicts, one for each

defendant, which appear on page 330 R. in Nos. 407-408. The jury returned separate verdicts as to each of the defendants. As to this plaintiff in error the jury returned a verdict in his favor and against the plaintiffs. In the cases tried before the Court separate findings were made and separate judgments rendered as to each of the defendants, and in each of the cases the Court found in favor of this plaintiff in error and against the various plaintiffs.

In each of the cases tried in the District Court the various plaintiffs appealed from the various judgments rendered in favor of E. F. Adams, sustaining her demurrer to the evidence and to the various judgments rendered in favor of this plaintiff in error and against the various plaintiffs. In each of these appeals the plaintiff below made none of the parties in the lower court parties to the appeals except this plaintiff in error and E. F. Adams. C. L. King, H. F. Ferry and L. D. Hadley prosecuted separate appeals from the judgment rendered against them and in favor of the plaintiffs. The appeals were docketed as separate causes, but were argued and submitted on the briefs and abstract filed in the G. L. Ramsey case and in the Ramsey Petroleum Company case, so that the appeals of the Supreme Court stood as follows:

G. L. Ramsey appealed from the judgment rendered against him in favor of this plaintiff in error and Adams; so did the Ramsey Petroleum Company and each of the other plaintiffs below in each of the other cases in the District Court of Butler County. In each of these appeals the Court affirmed the judgment as to Mrs. Adams, so that she is no longer interested in any way in these cases and has no judgment against her, and she went out of the cases on the sole proposition that she was neither an officer nor director of the bank at any of the times involved in any of these cases. The Supreme Court of Kansas re-

versed the various judgments in favor of this plaintiff in error, with instructions to enter in each of the cases a judgment in favor of the respective plaintiffs and against this plaintiff in error. No one was a party in the Supreme Court of Kansas in any of these appeals from the judgments of the lower court in favor of E. F. Adams and this plaintiff in error except the plaintiffs in the various cases and this plaintiff in error and E. F. Adams. E. F. Adams, upon a decision of the Supreme Court of the State of Kansas affirming the judgments of the lower court in her favor, had no further interest of any kind in the litigation. From the judgments of the Supreme Court in each of these various cases reversing the judgment of the lower court in his favor and ordering a judgment against him, this plaintiff in error has prosecuted a writ of error.

In the District Court separate answers were filed by each of the defendants in such actions.

This plaintiff in error filed an answer in each suit in which he denied all the allegations of the petition and, in addition, alleged that Section 9-163 of the Revised Statutes of 1923, under which the action was brought, was in violation of the Fourteenth Amendment to the Constitution of the United States, in that it sought to deprive him of property without due process of law, and in that it denied to him, in the jurisdiction of the State of Kansas, equal protection of the law. And also alleged that Section 9-164, Revised Statutes of 1923, was in violation of the Fourteenth Amendment to the Constitution of the United States, in that it denied to him equal protection of the law, and in that it deprived him of property without due process of law (R. Nos. 407-408, p. 31). He also denied that the bank was insolvent or in failing circumstances at the time of the reception of the deposits, and denied that his decedent, T. A. Kramer, knew that said

bank was in a failing condition, or insolvent, and denied that the said T. A. Kramer, by an examination into the affairs of the bank, could have ascertained that the bank was insolvent or in failing circumstances; denied that T. A. Kramer assented to any reception of such deposit, and also denied that T. A. Kramer at any time participated in the active conduct and management of the affairs of said bank, except in connection with such duties as he may have performed from time to time as a director of said bank.

He also made the following allegations:

"And further answering, this defendant alleges that T. A. Kramer, prior to the 10th day of July, 1922, and about the .... day of August, 1918, lived in the State of California, and on said last-mentioned date and while still in California was taken sick with obstruction of the bowels and was compelled to and did undergo a severe surgical abdominal operation, from the result of which he never fully recovered, and on or about the .... day of May, 1920, he returned to Eldorado, Kansas, where he was again compelled, by an aggravated recurrence of said trouble, to undergo another serious abdominal operation, and was, by reason thereof, unable to attend to any business, and was confined to the hospital where the operation was performed for a period of about three weeks, and after his discharge from the hospital was sick and enfeebled by reason of such condition, and never fully recovered therefrom. That on or about the 10th day of July, 1922, being still enfeebled and in poor health, he left Eldorado on a trip for the purpose of rest and recuperation, and went to East St. Louis, Illinois, where he remained with his brother, R. J. Kramer, until July 23, 1922, when still seeking rest and recuperation, he left with his brother, J. H. Kramer,

for an Eastern trip, and on August 15, 1922, when near the City of Boston, Massachusetts, he had an attack of complete bowel obstruction which entirely prevented the passage of fecal matter throught the bowels, and was immediately taken to the Commonwealth Avenue Hospital and placed in charge of competent surgeons, and on August 16, 1922, he underwent a surgical operation for this trouble, which was performed by Dr. Henry M. Chase of Boston. His abdomen was opened and it was found that the small intestines were completely obstructed by a large number of adhesions, and that the small intestines were ruptured and it was found impossible to release all the adhesions. That the rupture of the small intestines never healed but remained open during the remainder of his life, and the incision in his abdomen made in such operation remained open during the rest of his life. That for a time after said operation it was impossible for him to take nourishment in the usual way, and it became necessary to give him nourishment through the opening in the bowels.

"That from the 16th day of August, 1922, until the time of his death, which occurred July, 1923, he had what is known as a fecal fistula at the place where the incision was made for the operation, and during all the remainder of his life fecal matter from the small intestines constantly passed from the opening and inflamed the wound and flesh about the wound, and caused him great and constant pain and suffering. For some time after said operation he was sick and hovered between life and death with little hope of recovery, and afterwards and on September 4, 1922, his condition became so serious that it became necessary to perform another abdominal operation, and such operation was performed and restrictions of the bowels at different places were removed so far as it was possible to remove the same, but it was impossible to remove all of such restrictions. In this opera-

tion another opening was made through the abdominal walls over the cecem in the illic cecal region. That on account of his weakened physical condition it was impossible at this operation to give him an anesthetic, and in the performance of this operation a local anesthetic, called novocain, was used. After this operation he remained very sick and weak for more than a month, but finally gained sufficient strength so that by the middle of October, 1922, he was able to sit in a chair and move about the room without assistance.

"That on or about the 1st day of November, 1922, while he was still suffering greatly, it was determined best to remove him from said hospital and take him to East St. Louis, Illinois, to the home of his brother, R. J. Kramer, where he might be among his relatives and where he might receive and could receive and would receive the personal care and attention which he required.

"That during his trip from Boston to East St. Louis, he had to remain in his berth in the drawing room under the constant care of his nurse. That after he arrived at East St. Louis, he regained sufficient strength to enable him to walk about a little in the room, but this lasted for only two or three days. That he remained in East St. Louis until he died there, on the 23rd day of July, 1923. That during all the time he was in East St. Louis, except the period of two or three days above mentioned, he was confined to his bed, except for short periods, during which he was able to sit up in his chair when placed therein by his attendant.

"That during all the time from the first operation until the time of his death he was under the care of surgeons and physicians and two nurses.

"That about the middle of December, 1922, it became apparent to his physicians that another operation was necessary, and he was thereupon removed to

the Deaconess Hospital in East St. Louis, and on December 20, 1922, another abdominal operation was performed, to wit: The abdomen was opened at the outer border of the left rectus muscle, and the small intestine was anastomosed with the large intestines, and it was then discovered that it was impossible to release or remove all the adhesions binding the small intestines. That after this operation his condition did not improve, and the fistula before mentioned did not heal. That he remained at said hospital about a month, when he was again taken back to the home of his brother in East St. Louis, where his condition gradually grew worse until the date of his death.

"That from the time of his first operation until the time of his death, by reason of his sickness, suffering and physical conditions he was unable to attend to any business of importance. That he suffered all the time intense and severe pain; that by reason of his condition he was unable to return to Eldorado at any time from the date of his first operation, on August 16, 1922; that his suffering was so intense, his physical condition of such a character and nature and so affected him that it was impossible for him to direct his mind for any length of time to any business matter, or to give any attention to any business affairs at any time, and he was unable to concentrate his mind for any length of time on any of his affairs.

"That by reason of the facts and circumstances above set forth, it was impossible for him to give any attention to the affairs of said Butler County State Bank, and during all of said period he had no access to the books and records of said bank and was in no condition physically or mentally to make any examination of the business or the condition of said bank, and it was impossible for him to assent to the acceptance of any deposits in said bank. That during all the period of his illness as above described he was constantly attended by his brothers and their families,

and, acting under the advice of his physicians, all matters of business were kept from him so far as possible as to prevent him from worrying over the same and injuring his health thereby. That it would have been impossible for him to give any serious attention or consideration to business matters without seriously injuring his health and shortening his life."

Evidence was offered in support of the above allegations and the physical and mental condition of Mr. J. A. Kramer, from the time he was taken sick in Boston, July, 1922, until the date of his death, was shown to be substantially as set out in the answers (R. Nos. 407, 408, pp. 221, 234 to 242).

At the close of the testimony in relation to the physical and mental condition of T. A. Kramer the plaintiff in the lower court interposed an objection which was overruled. The objection is found on page 242 of the transcript of the record in cases Nos. 407 and 408.

The Court instructed the jury, in the jury case, that if it found from the evidence that Kramer was in the condition described and by reason thereof unable to examine into the condition of the bank, it should not take into consideration such failure in determining the question of whether he did or did not have knowledge of the insolvent condition of the bank, and instructed it that if he was in the condition described, and by reason thereof physically or mentally unable to make any examination he would not be required to make an examination and he would not be chargeable with failure so to do (pp. 324, 325 R. in 407 and 408).

Separate verdicts were submitted as to each of the defendants. Five verdicts were returned into court. One of them finding against C. L. King in the sum of $19,379.34, and similar verdicts as to the other defendants

except this plaintiff in error. They returned the following verdict as to him:

> "We, the jury, impaneled and sworn in the above-entitled cause, do upon our oath find for the defendant C. L. Harris, executor of the estate of T. A. Kramer, deceased, not liable on account of said T. A. Kramer being physically unfit to know the condition of the Butler County State Bank at the time the deposits were made by the plaintiff that are now in controversy" (R. Nos. 407, 408, p. 330).

The plaintiff filed a motion for a new trial which was overruled. Separate judgments were entered on the verdicts. The judgment as to King, Ferry and Ewing is found on pages 335 and 336 of the transcript of the record in Nos. 407, 408. The judgment as to this plaintiff in error is found on pages 336 and 337. The judgment as to this plaintiff in error was that the plaintiff take nothing by reason of his cause of action and that the judgment be rendered in favor of C. L. Harris, as executor of the last will and testament of T. A. Kramer, that he go hence without day and that he recover his costs from the plaintiff. All of the other cases here on writs of error were tried before the Court without a jury and submitted on the evidence introduced in the G. L. Ramsey case, as found in the transcript of the record of Nos. 407, 408, pages 1 to 290, inclusive, and the additional evidence as to the amounts of the various deposits. In each of the cases tried before the Court the Court made separate findings against the separate defendants and rendered a separate judgment against the defendant other than this plaintiff in error.

In the case of the Ramsey Petroleum Company, a separte judgment was rendered against C. L. King for the

sum of $27,211.96, with interest, and a similar judgment rendered against H. F. Ferry; also one against A. B. Ewing and one against L. D. Hadley for a like amount.

The Court made a special finding as to T. A. Kramer as follows:

> "The Court further finds that at the time of the making of the deposits set out in the plaintiff's amended petition, that by reason of the physical and mental incapacity of T. A. Kramer, that said T. A. Kramer was unable to make any examination of the books and records of the Butler County State Bank of Eldorado, Kansas, and had no personal knowledge of the making of such deposits, and that by reason of such physical and mental incapacity did not assent to the reception of such deposits by said bank and that against the defendant C. L. Harris, executor of the last will and testament of T. A. Kramer, deceased, that plaintiff is not entitled to recover in this action and that such defendant should recover judgment against the plaintiff for costs herein expended."

In each of the other cases the trial court made similar findings and rendered similar judgments in favor of this plaintiff in error. From the various judgments rendered in favor of this plaintiff in error the various plaintiffs appealed to the Supreme Court of the State of Kansas, where it was contended by them that the incapacity of Kramer constituted no defense and that under the provisions of Section 9-163, Revised Statutes of 1923, if he did not examine he was conclusively held to have knowledge of the condition of the bank and could not be heard to have any excuse or reason for such failure to examine, while this plaintiff in error contended that Section 9-163 of the Revised Statutes, if so construed, was in violation of the Fourteenth Amendment to the Constitution

of the United States, in that, so construed, it deprived him of property without due process of law and denied to him the equal protection of the law. He also contended that section 9-164 was in violation of the Fourteenth Amendment to the Constitution of the United States for the same reason.

The Supreme Court of the State of Kansas held with the appellants in each of the cases, holding that the special defense of incapacity was unavailing, held that the instructions of the Court Nos. 22, 23, 24 and 25 were each erroneous and held, as stated in the motion of the defendants in error to dismiss these writs of error, that the fact that the statutes hold the director to possess knowledge of the insolvency or the failing circumstances of the bank and does not permit him to show any excuse for failure to examine, does not deprive him of property without due process of law and does not deny him the equal protection of the law, and held that when insolvency or failing circumstances of a bank is established as a fact then knowledge of that fact is held to the director if he failed to discharge the duty imposed by the statute; that when T. A. Kramer accepted the office as director of the Butler County Bank he accepted it subject to all the requirements, obligations and liabilities imposed by the statute. That the prohibition and requirements of the statutes are positively mandatory; that failure to conform to the rule of conduct laid down in the statute imposed the liability thereby created and from which there is no escape. This is clearly set out in the argument of the defendants in error on their motion to dismiss.

The Supreme Court of the State of Kansas also held, as stated on page 12 of such argument, that an officer or director charged with a violation of the statute has the

right to defense on the issue of insolvency or failing circumstances, but he does not have the right to set up his ignorance occasioned by failure to discharge the duty imposed by statute as a defense against the liability thereof, and held, as stated on page 13 of said brief, that when the State of Kansas enacted the provisions of the statute hereinbefore set out, it laid down the yardstick by which the liability of a director or officer of a bank was to be measured, and that such statute contained the rule by which to measure the right to recover from directors for loss occasioned from violation of the duty imposed by statute. That it mattered not from what circumstances such violation arose.

It was contended by this plaintiff in error that such construction of the statute deprived his decedent's estate of property without due process of law and denied to him the equal protection of the law.

The Supreme Court of the State of Kansas, holding in substance as above set out, reversed the judgment of the District Court of Butler County, Kansas, in each of the cases in favor of this plaintiff in error, with instructions to the lower court to set aside such judgments and render a judgment in favor of each of the plaintiffs in the trial court, and it is from such judgments that these writs of error are prosecuted.

SPECIFICATIONS OF ERROR RELIED UPON.

First. The Supreme Court of the State of Kansas erred in holding and deciding that the provisions of Section 9-163, Revised Statutes of the State of Kansas, were valid and were not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Second. The Supreme Court of the State of Kansas erred in holding and deciding that the provisions of Section 9-164, Revised Statutes of the State of Kansas, were valid and were not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Third. The Supreme Court of the State of Kansas erred in holding and deciding that by the provisions of Section 9-163, Revised Statutes of the State of Kansas, this plaintiff in error was not deprived of privileges and immunities secured to other citizens of the United States.

Fourth. The Supreme Court of the State of Kansas erred in holding and deciding that by the provisions of Section 9-164, Revised Statutes of the State of Kansas, this plaintiff in error was not deprived of privileges and immunities secured to other citizens of the United States.

Fifth. The Supreme Court of the State of Kansas erred in holding and deciding that by the provisions of Section 9-163, Revised Statutes of the State of Kansas, this plaintiff in error was not deprived of property without due process of law.

Sixth. The Supreme Court of the State of Kansas erred in holding and deciding that by the provisions of Section

9-164, Revised Statutes of the State of Kansas, this plaintiff in error was not deprived of property without due process of law.

Seventh. The Supreme Court of the State of Kansas erred in holding and deciding that the provisions of Section 9-163, Revised Statutes of the State of Kansas, did not deny to this plaintiff in error equal protection of the law.

Eighth. The Supreme Court of the State of Kansas erred in holding and deciding that the provisions of Section 9-164, Revised Statutes of the State of Kansas, did not deny to this plaintiff in error equal protection of the law.

Ninth. The Supreme Court of the State of Kansas erred in holding and deciding that the provisions of Section 9-163, Revised Statutes of the State of Kansas, as interpreted by the Supreme Court of the State of Kansas, did not deny to this plaintiff in error equal protection of the law in depriving him of the right and benefit of showing that it was impossible for his decedent, T. A. Kramer, to make examination into the affairs of the said Butler County State Bank during the time in question in said causes.

Tenth. The Supreme Court of the State of Kansas erred in holding and deciding that the provisions of Section 9-163, Revised Statutes of the State of Kansas, which provide that if an officer or director of a bank does not examine into the affairs of the bank he shall be held to have had knowledge of the condition of the bank were not in violation of the Fourteenth Amendment to the Constitution of the United States, and did not, as interpreted by said Court, deprive this plaintiff in error of property without due process of law, when the circumstances were that

during the time in question it was impossible for this plaintiff in error's decedent, T. A. Kramer, a director of said bank, to make an examination of said bank.

Eleventh. The Supreme Court of the State of Kansas erred in holding and deciding that the provisions of Section 9-163, Revised Statutes of the State of Kansas, which by its terms created a conclusive presumption of knowledge against the decedent of this plaintiff in error, T. A. Kramer, were not in violation of the Fourteenth Amendment to the Constitution of the United States.

Twelfth. The Supreme Court of the State of Kansas erred in holding and deciding that the provisions of Section 9-164, Revised Statutes of the State of Kansas, which by its terms made the fact that the said banking institution was insolvent or in failing circumstances at the time of the reception of the deposits charged to have been received, prima facie evidence of the assent of the decedent of this plaintiff in error to such deposit, were not in violation of the Fourteenth Amendment to the Constitution of the United States.

Thirteenth. The Supreme Court of the State of Kansas has held and decided herein that the provisions of Section 9-163, Revised Statutes of the State of Kansas, created a conclusive presumption of knowledge and has held and decided herein that under said provisions this plaintiff in error would not be permitted to show any reason or excuse whatsoever why his decedent, T. A. Kramer, had not made an examination into the affairs of the said Butler County State Bank, and in so holding and deciding erred in holding and deciding that said statute, as so interpreted, was not in violation of the Foutreenth Amendment to the Constitution of the United States.

SUMMARY.

Section 9-164 of the Revised Statutes of Kansas for 1923 is unconstitutional as in violation of the Fourteenth Amendment to the Constitution of the United States, because it deprives persons, and particularly this plaintiff in error and his decedent's estate, of property without due process of law, and denies equal protection of law by seeking to create a prima facie resumption of assent by proof of a fact entirely unrelated to the main fact sought to be established.

Railway Company v. Turnipseed, 219 U. S. 35;
Hawes v. Georgia, 258 U. S. 1;
Manning v. John Hancock Mut. L. Ins. Co., 100 U. S. 693;
Luria v. United States, 231 U. S. 9-25;
McFarland v. American Sugar Co., 241 U. S. 79;
Bailey v. Alabama, 219 U. S. 219.

Section 9-164 of the Revised Statutes of Kansas for 1923 is unconstitutional and violative of the Fourteenth Amendment in that it deprives persons, and particularly this plaintiff in error and his decedent's estate, of property without due process of law by creating a presumption which is based upon a presumption.

5 C. J. 811;
Welch v. Sackett, 12 Wis. 243-257;
Jewell v. Jewell, 84 Me. 304-307, 24 Atl. 858;
Hanscom v. Home Ins. Co., 92 Me. 333, 339, 38 Atl. 324;
Patterson v. Stewart, 41 Minn. 84, 94, 42 N. W. 926;
22 C. J. 84;
Railroad Co. v. Baumgartner, 74 Kans. 148;
United States v. Ross, 92 U. S. 281;

Manning v. John Hancock Mut. L. Ins. Co., 100 U. S. 693, 10 Ann. Cases 1097;
Cunard Steamship Co. v. Kelley, 126 Fed. 610, 66 C. C. A. 533;
10 R. C. L. 870;
Duncan v. Railroad Co., 82 Kans. 230.

Section 9-163 of the Revised Statutes of Kansas for 1923, as construed by the Supreme Court of the State of Kansas in these cases, violated the provisions of the Fourteenth Amendment to the Constitution of the United States as to this plaintiff in error in that it required the decedent of this plaintiff in error to do the impossible.

"Impossobilium Nulla Obligatio Est," Wharton Legal Lexicon;
31 C. J. 258;
First Nat. Bank of Belle Plaine v. McConnell, 14 L. R. A. (n. s.) 616-618, 114 N. W. 1128;
"Impotentia Excusat Legem," Bouvier Law Dictionary;
Bayer v. Hoboken, 40 N. J. L. 152, 155;
Parker's Estate, 19 Pa. Co. 606-608;
"Lex Non Cogit Ad Impossibilia," Broom's Legal Maxims, *238;
"Lex Non Intendit Alliquid Impossibile," Black's Law Dictionary;
36 C. J. 1048;
Williams v. Hays, 157 N. Y. 541, 43 L. R. A. 253, 255;
United States v. Kirby, 7 Wall. 482;
People v. McRoberts, 62 Ill. 38;
Fusz v. Spaunhorst, 67 Mo. 256;
St. Louis and S. F. Ry. Co. v. Evans and Howard Brick Co., 85 Mo. 307-329;
Doaldson v. Wood, 26 Wend. 399;

Henderson v. Mayor of New York, 92 U. S. 268;
In re Leong Yick Dew, 19 Fed. 490, 495;
Runyan et al. v. Culver, L. R. A. (1916 F.) 3;
Wheeler v. Conn. Mut. Life Ins. Co., 82 N. Y. 543;
Berg v. Erickson, 234 Fed. 817, L. R. A. (1917 A) 648-651;
Usher v. Hiatt, 18 Kans. 195;
Briggs v. Spaulding, 141 U. S. 132.

Section 9-163 of the Revised Statutes of Kansas for 1923 violates the Fourteenth Amendment to the Constitution of the United States because it creates a conclusive presumption of knowledge on account of failure to examine the bank. This was not within the power of the Kansas Legislature.

Bailey v. State of Alabama, 219 U. S. 219;
Cooley on Constitutional Limitations (5th Ed.), 453;
Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. Ed. 234;
Galveston H. & S. A. R. Co. v. Texas, 210 U. S. 217;
Louisville & Nashville Ry. Co. v. Melton, 218 U. S. 36;
Luria v. United States, 231 U. S. 9, 58 L. Ed. 101;
Larson v. Dickey, 42 Am. Rep. 595;
Milheim et al. v. Moffatt Tunnel Imp. Dist. et al., 262 U. S. 710, 67 L. Ed. 1194;
Meyer v. Berland, 39 Minn. 438, 12 Am. St. Rep. 663, 40 N. W. 513;
McFarland v. American Sugar & Refining Co., 241 U. S. 79, 36 Sup. Ct. Rep. 498;
Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. Ed. 552;
Railroad Co. v. Simonson, 64 Kans. 802;
Railway Co. v. Payne, 83 Ark. 816, 34 Am. Rep. 55;
Railway Co. v. Parks, 32 Ark. 131;
Railway Co. v. Turnipseed, 219 U. S. 35;

Schlesinger v. Wisconsin, 270 U. S. 230, 70 L. Ed. 557;
Vega S. S. Co. v. Elevator Co., 74 Am. St. Rep. 484;
Yee Hem v. U. S., 260 U. S. 178, 69 L. Ed. 904;
Ziegler v. Railroad Co., 58 Ala. 599, 6 R. C. L. 453, 462.

Questions of fact are not open in the Supreme Court of Kansas on appeal.

Bayer v. Cockerill, 3 Kans. 282;
Mueller v. Campbell, 95 Kans. 420;
Bartells v. School District, 89 Kans. 233;
Bateman et al. v. Preisser et al., 123 Kans. 217;
Reeves v. Sroade, 124 Kans. 423.

A writ of error to this Court would not lie from the decision of the Supreme Court of Kansas in the case of Ramsey Petroleum Company v. Adams, 119 Kans. 844, because that was not a final decision.

Georgia Ry. & Power Co. et al. v. Town of Decatur, 262 U. S. 432.

ARGUMENT.

Section 9-164 of the Revised Statutes of Kansas for 1923 is unconstitutional and is in violation of the Fourteenth Amendment to the Constitution of the United States because it deprives persons and particularly this plaintiff in error and his decedent's estate of property without due process of law and denies equal protection of law by seeking to create a prima facie presumption of assent by proof of a fact entirely unrelated to the main fact sought to be established.

Section 9-164, Revised Statutes of Kansas for 1923, provides that proof of insolvency shall be prima facie evidence both of knowledge of the insolvency of the bank and of assent to the reception of deposits.

Every man is presumed to do his duty. The law does not presume that any one charged with an obligation violates the obligation. The law forbids the reception of deposits when it is known that the bank is insolvent and makes every officer assenting to the reception of deposits when he knows the bank insolvent individually liable for such deposits so received.

It is, therefore, to be presumed that an officer and director of a bank will not violate this provision of this statute. When proof is introduced tending to show that the bank was insolvent at the time of the reception of the deposit in question, such proved fact may tend to prove that the officer or director of the bank had knowledge of its condition, but it has no tendency to prove that he assented to the reception of deposits. The natural presumption would be that an officer, who is presumed to do his duty, would not assent to the reception of deposits when he knew that the bank was insolvent.

Certain facts may tend to prove certain other facts, but it is essential that such fact shall have a rational connec-

tion with the fact to be proved; that is, there must be a rational connection between the fact proved and the ultimate fact presumed. The inference that one fact may prove another shall not be so unreasonable as to be arbitrary. In what way does the mere fact that a bank was insolvent at a certain time tend to prove that the officer or director of the bank violated his oath of office and assented to the unlawful reception of deposits? Applied to the cases before this Court, what tendency does the mere fact that in the month of March, 1923, when certain deposits were received in the Butler County State Bank, the bank was insolvent have to prove that T. A. Kramer, who was five hundred miles away confined to his bed under the influence of opiates, mentally and physically incapacitated from transacting any business of any kind, then assented to the reception of such deposits?

In the case of Railway Company v. Turnipseed, 219 U. S. 35, at page 43 of the opinion, it is said:

> "That the legislative presumption of one fact from evidence of another may not constitute a denial of due process of law, or a denial of the equal protection of the law. It is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence operate to preclude the party from the right to present his defense to the main fact thus presumed."

To the same effect is the holding in Luria v. United States, 231 U. S. 9-25.

In the case of McFarland v. American Sugar Company, 241 U. S. 79, it was held that a Louisiana statute, creating

the rebuttable presumption that any person systematically paying in that state a less price for sugar than he paid in another state, was a party to a monopoly or conspiracy in restraint of trade, was unconstitutional under the Fourteenth Amendment as being so arbitrary as to be beyond possible justice, the presumption created having no foundation except an intent to destroy, and there is no rational connection between the fact proved and the ultimate fact presumed.

In the case of Hawes v. Georgia, 258 U. S. 1, on page 4 of the opinion, it is said:

> "In Hawkins v. Bleakly, 243 U. S. 210-214, it is said: 'The establishment of presumptions and all rules respecting the burden of proof is clearly within the domain of the state governments, and that a provision of this character not unreasonable in itself and not conclusive of the rights of the party, does not constitute a violation of due process of law (Mobile, Jackson & Kansas City R. R. Co. v. Turnipseed, 219 U. S. 35-42).' Undoubtedly there must be a relation between the two facts (Bailey v. Alabama, 219 U. S. 219; McFarland v. American Sugar Refining Co., 241 U. S. 79); that is, if one may be evidence of the other, there must be connection between them—a requirement that reasoning insists on and necessarily the law."

Section 9-163 of the Revised Statutes of Kansas for 1923, as construed by the Supreme Court of the State of Kansas in these cases violates the provisions of the Fourteenth Amendment to the Constitution of the United States as to this plaintiff in error in that it required the decedent of this plaintiff in error to do the impossible.

The Supreme Court of the State of Kansas held that the provisions of section 9-163, which provide that it shall be

the "duty of every such officer, agent or manager of such banking institution to examine into the affairs of the same, and if possible know its condition, and upon failure of any such person to discharge such duty he shall for the purpose of this act be held to have had knowledge of the insolvency of such bank, or that it was in failing circumstances," was mandatory and compulsory; that no excuse for failure to examine would avail an officer or director, and that the fact that the decedent of this plaintiff in error was sick and unable, mentally and physically, to make any examination of the bank or to attend to any business matter in connection with the bank or to come to El Dorado, where the bank was located, for the purpose of making an examination, furnished no excuse whatever for his failure to examine; that his failure under such conditions charged him with knowledge of the insolvent condition of the bank, or that it was in failing circumstances at the time each deposit was made, and that he would not be permitted to offer any evidence showing his condition or any excuse whatsoever for his failure to examine.

This holding of the Supreme Court required the decedent of this plaintiff in error to do the impossible. It interpreted the statute so that the Legislature by this provision of the act was held to have required the impossible. This neither the Court nor the Legislature can require. Such holding violates the provisions of the Fourteenth Amendment to the Constitution of the United States and it violates the fundamental principles of the common law and every principle of justice.

The universal rule is, or was, until the Supreme Court of Kansas spoke, that where an obligation or duty is imposed upon a person by law, he will be absolved from

liability for nonperformance if such nonperformance was caused by an act of God or because of impossibility.

The legal maxims "Impossibilium nulla obligatio est," "Impotentia excusat legem," "Lex non cogit ad impossibilia" and "Lex non intendit alliquid impossibile" are universally recognized.

In Broom's Legal Maxims it is said:

> "The law in its most positive and peremptory injunctions is understood to disclaim, as it does in its general aphorisms, all intention of compelling to impossibilities and the administration of laws must adopt that general exception in the consideration of all particular cases."
>
> "The law intends what is agreeable to reason; it does not suffer an absurdity. Impossibility is an excuse in law and there is no obligation to perform impossible things."
>
> Williams v. Hays, 157 N. Y. 541, 43 L. R. A. 253-255.

"Impossibilium nulla obligatio est. The law never requires the doing of an impossible thing (Dow v. State Bank, 88 Minn. 355, 93 N. W. 121), though it often awards damages for a failure to perform express contract stipulations, where performance was rendered impossible by reason of intervening overpowering causes other than an act of God (9 Cyc Law and Proc. 627), but the principle involved in cases of that kind does not apply to the duties or obligations arising by implication of law (Paradine v. Jane, Aleyn, 26; School District No. 1 v. Dauchy, 25 Conn. 530, 68 Am. Dec. 371). In other words, a person will be relieved from the performance of a duty imposed upon him by law where the performance is rendered impossible by reason of causes for which he was not

responsible, where he would not for similar reasons be relieved from express contract stipulations— * * *. The duty to present them for payment is one imposed by law, not by expressed contract, and compliance therewith being impossible, plaintiff's failure to present them is not fatal to its right to recover thereon."

First National Bank of Belle Plaine v. McConnell, 14 L. R. A. (n. s.) 616-618, 114 N. W. 1128 (Minn.).

"To this point of the investigation, therefore, the familiar maxim applies 'Lex non intendit alliquid impossibile.' The reason of the law in such cases should prevail over its letter and general terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence, the presumption being indulged that the law makers intended exceptions to language which otherwise would lead to such anamolous results."

U. S. v. Kirby, 7 Wall. 482;
People v. McRoberts, 62 Ill. 38;
Fusz v. Spaunhorst, 67 Mo. 256;
St. Louis & S. F. Ry. Co. v. Evens & Howard Brick Co., 85 Mo. 307-329.

"If, then, it is impossible to comply with the condition, the impossible condition must be regarded as not intended as to this class of laborers; or, if intended, it must be void. The law requires nothing impossible—Lex non cogit ad impossibilia (Bouv. Law Dict., 'Maxims; Broom, Max. 242); and lex non intendit aliquid impossibile (Bouv. Law Dict.)—the law intends not anything impossible—are among the most venerable maxims of the law. In a statute, 'No text imposing obligations is understood to demand impossible things' (Sedg. St. Law, 191). 'Provisions in Acts of Parliament are to be expounded according to the ordinary sense of the words, unless

such construction would lead to some unreasonable result, or be inconsistent with, or contrary to, the declared or implied intention of the framer of the law, in which case the grammatical sense of the words may be modified, restricted, or extended to meet the plain policy and provision of the act' (Dwaris' St. 582). The rule is to construe the words 'in their ordinary sense, unless it would lead to absurdity or manifest injustice; and if it should so vary them as to avoid that which certainly could not have been the intention of the Legislature, we must put a reasonable construction upon the words' (Id. 587; see Donaldson v. Wood, 22 Wend. 399; Lake Shore Ry. Co. v. Roach, 80 N. Y. 339). 'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over the letter' (U. S. v. Kirby, 7 Wall. 486). 'In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. * * * To require a heavy and almost impossible condition to the exercise of this right, with the alternative of payment of a small sum of money, is, in effect, to demand payment of that sum' (Henderson v. Mayor of New York, 92 U. S. 268)."

In re Leong Yick Dew, 19 Fed. Rep. 490-495.

In the case of Briggs v. Spaulding, 141 U. S. 132, this Court says, on page 155 of the opinion:

"Charles T. Coit had been the first cashier of the bank and was elected a director in 1870. He was its president from June, 1879, to the date of his death, December 11, 1881. On October 3, 1881, a meeting

of the board of directors was held, at which Charles T. Coit, Francis E. Coit, Vought and Lee were present. Cushing, who had resigned on the 24th of September, was absent. It appears that at this meeting a resolution was adopted giving Charles T. Coit, the president, a leave of absence, on account of ill health, for one year. No one was elected president prior to January 10, 1882, in his place. There is no doubt of the severity of his illness, and the necessity for his absence, but it is contended that the resolutions referred to absence as president and not as director, and that no power existed to allow leave of absence to a member of the board, and so that the resolution should be limited to excuse him from attendance at the bank but not to permit him to leave the city; and it is said that if he wished to be absolved from responsibility while absent in search of restored health, he should have resigned. If such were the rule we apprehend that moneyed corporations would find extreme difficulty in obtaining proper persons to act as directors. But it is not the rule. Mr. Coit was guilty of no want of ordinary care in acting upon the leave of absence, and is not to be held because he did not resign. Invalids are permitted to indulge in the hope of recovery, and are not called upon by reason of illness to retire at once from the affairs of this world and confine themselves to preparation for their passage into another. There was here no neglectful abandonment of duty from October 3, to December 11, and the decree in favor of the administrators of Charles T. Coit was properly rendered."

Section 9-163 of the Revised Statutes of Kansas for 1923 violates the Fourteenth Amendment to the Constitution of the United States, because it creates a conclusive presumption of knowledge on account of failure to examine.

Under this statute the liability is imposed upon a director not for failure to make an examination into the affairs

of a bank, but for receiving or assenting to the reception of deposits when he knew that the bank was at the time insolvent, the liability being based upon assent to the reception of deposits when the person assenting knew the bank was insolvent. In order for a plaintiff to recover under this statute he must prove, first, that the bank was insolvent at the time the deposit was made; second, that the director or party sought to be charged knew that it was insolvent, and, third, that, knowing that it was insolvent, he received or assented to the reception of the deposit. It provides that it shall be unlawful for an officer or director to assent to the reception of the deposit by his banking institution after he shall have knowledge of the fact that it is insolvent or in failing circumstances. It does not seek to impose liability upon an officer or director of a bank for failure to examine a bank, and if it did, the officer or director charged would be excused if examination by him was impossible by reason of things beyond his control. But the statute does not seek to create any liability except where one assents when he has knowledge. Therefore, that portion of the statute which says that upon failure to discharge the duty of examining the bank, a director or officer shall, for the purpose of the act be held to have knowledge of the insolvency of such bank or that it was in failing circumstances as it was interpreted by the Supreme Court of this state, creates a conclusive presumption of knowledge. This it is not within the power of the Legislature to do. The plaintiff in error in this case had a right to show that his decedent did not have knowledge that the bank was insolvent at the time of the reception of the deposits. This right was granted to each of the other directors and officers sued, because they had made examination, but it was denied to this

plaintiff in error because the Court found that his decedent had not examined and that such failure to examine was because of his mental and physical condition which rendered him incapable of making an examination. This statute, as interpreted by our state Supreme Court, means that an officer and director charged with a violation of a statute has the right to defense on the issue of insolvency or failing circumstances, but does not have the right to set up his ignorance occasioned by failure to discharge the duty imposed by statute as a defense against the liability thereof. Under this interpretation, an officer or director may examine the bank and may show that he did not have knowledge of the insolvent condition of the bank, while another officer and director is denied the right of showing that he did not have knowledge of the condition of the bank at the time the deposit in question was received by showing that at the time of the reception of the deposits and for many months prior thereto he had been totally paralyzed, unable to exercise any of his body and mental faculties.

If this contention of the defendants in error is correct, if the position taken by the Supreme Court of the State of Kansas is correct, if the interpretation put upon this statute by the Supreme Court of the State of Kansas is correct, then no officer or director who fails to examine a bank can ever show that he did not have knowledge of the insolvency of the bank. If one is an officer and director of a bank, and the bank is perfectly solvent today, and such officer and director becomes insane and while insane the bank becomes insolvent, such insane person, if he failed to examine the bank, cannot be permitted to show that he did not examine because he was insane, but if by any chance he does make an examination of

the bank, then he may show that he did not have knowledge of its condition because that at the time he made the examination he was so insane that he could not discover the bank's condition. In these cases there was no dispute in the testimony as to the physical and mental condition of T. A. Kramer, but, because he did not examine while in this condition, he was, by the decision of the State Supreme Court, precluded from showing any set of facts which showed that he did not have knowledge that the bank was insolvent; and, because he did not examine into the affairs of the bank, the State Supreme Court held that the trial court could not take into consideration any facts or circumstances which might tend to show he did not have knowledge. In other words, because he failed to examine, the door was shut against him on the question of knowledge. If this decision stands, a trial court is bound to say, in all cases that may hereafter come before it, to a director who did not examine:

> "It is true that, nine months before the deposit was made, you examined the bank and you did not find it to be insolvent and did not know it was insolvent, but you were immediately taken seriously sick, and that sickness was of such a nature as to render you incapable mentally and physically of making any examination into the affairs of the bank or of learning anything about its condition, yet I must hold you to have had knowledge of the insolvent condition of the bank because you failed to examine, for the Supreme Court says that the statute in question means that if you have so failed, even though such failure was caused by an act of God or by causes entirely without your control, you are still conclusively bound by such failure to have knowledge."

Under this statute there can be no recovery unless the parties suing establish that the director or officer sued had knowledge of the insolvent condition of the bank when he assented to the reception of the deposit. The action is not an action on contract, but it is in the nature of an action sounding in tort. If knowledge is an essential thing to prove in order to recover under this statute, then want of knowledge is an essential thing for an officer or director to establish in order to escape liability, and, if established, the result is that he escapes liability. Therefore, knowledge and want of knowing being facts to be established, it is not within the power of the Legislature to make any fact conclusive of the ultimate fact to be established. To do so is for the Legislature to infringe on the rights of the Court and to try a case by legislative enactment. It has been repeatedly held that it is not within the power of the Legislature to create a conclusive presumption.

The Supreme Court of Kansas held that a statute which made the specification of weights in bills of lading issued by railroad companies for hay, etc., shipped over their lines conclusive evidence of the correctness of such weight was unconstitutional because denying to the companies due process of law and because wrongfully depriving the courts of the judicial power to determine the weight and sufficiency of evidence.

Railroad Company v. Simonson, 64 Kan. 802.

The Supreme Court of Arkansas held in Railway Co. v. Payne, 83 Ark. 816, 34 Am. Rep. 55, that:

> "The Legislature cannot prescribe a rule of conclusive evidence."

In Cairo Railroad Company v. Parks, 32 Ark. 131, the Court said:

> "The Legislature may declare what shall be received as evidence, but it cannot make that conclusively true which may be shown to be false; that all events if such facts are necessary to show that the substantial rights of property are to be effected and he is made to lose his property."

In Meyer v. Berlandi, 39 Minn. 438, 12 Am. St. Rep. 663, 40 N. W. 513, it was said:

> "A man cannot be thus deprived of his property without his consent. The Legislature may doubtless establish rules of evidence; but to enact a law making evidence conclusive which is not so necessarily in and of itself, and thus preclude a party from showing the truth, would be nothing short of confiscation of property and a destruction of vested rights without due process of law."

In Cooley on Constitutional Limitations, 5th Ed., 453, it is said:

> "But there are fixed bounds to the power of the Legislature over this subject which cannot be exceeded. As to what shall be evidence, and which party shall assume the burden of proof in civil cases, its authority is practically unrestricted, so long as its regulations are impartial and uniform; but it has no power to establish rules which, under pretense of of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights."

In Railroad Company v. Turnipseed, 219 U. S. 35, Justice Lurton, in the opinion, says:

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.
>
> "If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

In Luria v. United States, 231 U. S. 9, 58 L. Ed. 101, it was held:

> "Constitutional rights are not invaded by the declaration of Sec. 15 of the Naturalization Act of June 29, 1906, that taking up a permanent residence in a foreign country within five years after the issuance of a certificate of citizenship shall be considered prima facie evidence of the lack of intention to become a permanent citizen of the United States at the time of the application for citizenship, which, in the absence of countervailing evidence, shall be sufficient to warrant the cancellation of the certificate as fraudulent, since this provision prescribed a rule of evidence, not of substantive right."

In Railroad v. Turnipseed, 219 U. S. 35, supra, it is said:

> "The law of evidence is full of presumptions either of fact or law. The former are, of course, disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded."

To the same effect was the holding in Yee Hem v. U. S. 219; it was said:

> "A constitutional prohibition cannot be transgressed indirectly by creating a statutory presumption any more than by direct enactment."

In Zeigler v. Railroad Company, 58 Ala. 599, it was said:

> "Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, in its most comprehensive sense; to be heard by testimony or otherwise; and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact, or liability, be conclusively presumed against him, this is not due process of law."

In 6 R. C. L. 453 it is said:

> "Due process of law clearly implies the right of the person affected thereby to be present before the tribunal which pronounces judgment concerning his life, liberty or property to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears upon the question of right in the matter involved."

In Larson v. Dickey, 42 Am. Rep. 595, page 606 of the opinion, it is said:

> "We apprehend that it is beyond the power of the Legislature to restrain a defendant in any suit from setting up a defense to an action against him. Due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity when in court to establish any fact which, according to the usages of the common law or provisions of the Constitution, would be a protection to his property."

In 6 R. C. L. 462 it is said, speaking of the power of the Legislature:

> "As to what shall be evidence and who shall assume the burden of proof, its power is unrestricted so long as its rules are impartial and uniform, but it has no power to establish rules which, under pretense of regulating evidence, altogether prohibit a party from exhibiting his rights, since this would substantially deprive him of due process of law. A conclusive presumption cannot be established which would overrule the essential facts and thereby preclude a party from asserting the truth."

In Vega S. S. Company v. Elevator Company, 74 Am. St. Rep., page 484, it was said on page 486:

> "But is it competent for the Legislature to make the weight thus ascertained absolutely conclusive? We are of the opinion that it is not. The Legislature cannot in this manner provide for the arbitrary exercise of power so as to deprive a person of his day in court to vindicate his rights. And the law which closes his mouth absolutely when he comes into court is the same, in effect, as the law which deprives him

of his day in court. (See Cooley's Constitutional Limitations, 6th Ed., 452; 6 Am. & Eng. Ency. of Law, 2nd Ed., 1050; Graves v. Northern Pac. R. R. Co., 5 Mont. 556, 51 Am. Rep. 81; Johns v. State, 55 Md. 350; Wantlan v. White, 19 Ind. 470.)"

The statute in question was originally before the Supreme Court of Kansas on an appeal in these cases from the District Court of Butler County from a judgment sustaining a demurrer to the defendant's defense that the statute was unconstitutional as in violation of the Fourteenth Amendment to the Constitution of the United States in that it deprived the defendants of property without due process of law and denied to them equal protection of the law, and the Court held:

"In the statute (R. S. 9-163, 9-164) fixing liability of officers and directors for the unlawful reception of deposits by an insolvent bank under their control, neither the due-process clause of the Federal Constitution nor the state constitutional guaranty of the right to a jury trial is violated by the statutory declaration that upon failure of any officer or director to examine the bank he shall be held to have had knowledge of the insolvency of the bank or that it was in failing condition at the time the deposits were unlawfully received by the bank."

On page 848 of the opinion it is said:

"Is this imposition of liability for negligence and official delinquency at odds with the Fourteenth Amendment? Defendants so contend; they cite texts and authorities, including our own cases, like Railway Company v. Simonson, 64 Kan. 802, 70 Pac. 881, and Petersilie v. McLachlin, 80 Kan. 176, 101 Pac. 1014, to the effect that due process of law is denied by a statu-

tory declaration that such and such facts shall be conclusive proof of something required to be established in a judicial proceeding when such facts are not of such inherently probative character. With this general doctrine of the cases relied on there need be no quarrel; certainly, this Court has no disposition to disturb legal principal of such fundamental worth (12 C. J. 1234; 6 R. C. L. 462; 2 Wigmore on Evidence [2nd ed.] 1016 et seq.) But we cannot agree that the statutory provision under present scrutiny is justly subject to the criticism leveled against it. The provision reads: 'And upon failure of any such person (officer or director) to discharge such duty (to examine the bank) he shall, for the purpose of this act, be held to have had knowledge of the insolvency of such bank, or that it was in failing circumstances.' This is not an arbitrary edict of the Legislature making evidence out of facts which are without inherent evidential significance, nor an arbitrary perversion of the rules of evidence. It is rather a statutory declaration of substantive law. We have many such rules of substantive law touching civil liability. Analogous liabilities are imposed by substantive law, even where there is little or no element of actual wrongdoing or negligence on the part of those subjected thereto. Such is the plight of stockholders of an insolvent bank. So, too, a business partner is liable, as a matter of law, for many acts and delects that may have been committed without his knowledge or assent, and even in violation of his wishes and instructions. Nothing is more common than the imposition of liability upon a principal for the acts, contracts or torts of his agent when done under color of his agency, although the principal may have been in no sense morally culpable for such acts."

Ramsey Petroleum Co. v. Adams, 119 Kan. 841.

Neither state courts or Legislatures, by giving a statute a particular name, or by the use of a particular form of words, can take away the duty of this Court to consider its real nature and effect.

> Galveston H. & S. A. R. Co. v. Texas, 210 U. S. 217;
> Choctaw O. & G. T. Co. v. Harrison, 235 U. S. 292, 59 Law ed. 234.

In support of the construction placed upon the statute in question by the Supreme Court of the State of Kansas, reliance is placed, and the decision largely based, upon the decision in Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552.

The statute involved in that case provided that:

> "In all suits upon policies of insurance against loss or damage by fire, hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein on said property; and in case of total loss of the property insured the measure of damage shall be the amount for which the same was insured, less whatever depreciation in value below the amount for which the property is insured, the property may have sustained, between the time of issuing the policy and the time of the loss, and the burden of proving such depreciation shall be upon the defendant."

In that case the Court recognized the inability of the Legislature to make an ultimate question of fact conclusively proved by the proof of another fact.

The statute in question seeks to create a liability upon officers and directors of a bank where no such liability existed at common law. A reading of the sections in-

volved shows that it was intended to impose liability upon officers and directors of a bank who should receive deposits or assent to the reception of deposits, when they knew that the bank was insolvent or in failing circumstances. No liability is imposed upon one who fails to examine a bank, but the statute attempts to make a failure to examine a bank conclusive proof that the director knew at the time of the reception of the deposit in question that the bank was insolvent or in failing circumstances.

Under the interpretation put by the Supreme Court of Kansas upon Sec. 9-163 of the Revised Statutes of Kansas 1923, such statute does not make a failure to examine a bank prima facie evidence of knowledge, but makes it conclusive on the question of knowledge. In effect it says to directors and officers who may be sued under the statute:

> "Under this statute all of you who received or assented to the reception of deposits by your bank when you knew your bank was insolvent or in failing circumstances, are individually liable for all such deposits, and you who fail to examine your bank shall, for the purpose of this action, be held to have had knowledge that the bank was insolvent or in failing circumstances. It makes no difference what caused your failure to examine. You may have failed because you were, during the period involved, mentally incapacitated from making an examination. You may, during the period involved, have been confined to your bed by typhoid fever and in the delirium of typhoid fever. You may, during the time involved, have been lying unconscious from the effect of a paralytic stroke. During the period involved you may have been suffering intense physical pain and under the influence of opiates and unable to take any

part in business affairs. Acts of God may have intervened to prevent you from making an examination into the affairs of the bank. However, these things will avail you nothing. You will not be permitted to show any of these things, in order to show want of knowledge or for the purpose of showing that it was impossible for you to examine into the bank. The officers and directors who did make an examination will be permitted to show that they did not know that the bank was insolvent. They will be permitted to show that it was impossible from any examination of the bank to discover the condition of the bank. They will be permitted to put on expert witnesses to prove that no examination into the affairs of the bank, however thorough, would have disclosed the condition of the bank and may establish that it was impossible for officers and directors of a bank by any examination made or by any inquiry made to have learned of the condition of the bank at the time the deposits were received. They may be able to prove these facts by an overwhelming preponderance of the evidence, and yet the jury, under this statute, must find that you did know the bank was insolvent or in failing circumstances, while at the same time finding that it was impossible for the officers and directors of a bank, by any examination or inquiry, to have learned the condition of the bank at the time the deposits were received."

Clearly this statute bases the right to recover upon the assent to the reception of deposits by an officer or director of a bank when he knew that the bank was insolvent and then makes proof of the failure to examine conclusive as to the ultimate fact of knowledge, thus creating a conclusive presumption of one fact by proof of another fact, and giving to the officer or director failing to examine no right to rebut such presumption or to introduce any evi-

dence tending to prove that he did not have knowledge. This the Legislature cannot do, and this construction put upon this statute by the state Supreme Court violates the Fourteenth Amendment to the Constitution of the United States, by depriving the plaintiff in error of the right to show that his decedent did not know of the insolvent condition of the bank, and of showing that any failure on his part to examine was caused by act of God or by reason of things beyond his control.

We respectfully submit that in these cases there was drawn in question the validity of Sections 9-163 and 9-164 of the Statutes of the State of Kansas, on the ground that each section is repugnant to the Constitution of the United States, and the decision of the highest court of that state was in favor of the validity of each of said statutes. That the serious illness of this plaintiff in error's decedent from August, 1922, to the time of his death in July, 1923, with the deposits being made and the closing of the bank having occurred in March, 1923, place this plaintiff in error in an especially favorable position to raise the question of the constitutionality of these statutes. That the question was raised at the first opportunity and kept in the cases throughout the litigation. That the mere fact that this plaintiff in error's decedent executed the oath as director and made a codicil to his will when he was seriously ill five hundred miles from the bank, does not show that he was able to examine the bank or that he kept in touch with its affairs. That under the authority of Briggs v. Spaulding, 141 U. S. 132, it was not shown that this plaintiff in error's decedent violated his duty. That section 9-164 is repugnant to the Fourteenth Amendment to the Constitution of the United States because it made proof of the insolvency of the bank

prima facie evidence of this plaintiff in error's decedent's assent to the reception of the deposits in question. That section 9-163 is repugnant to the Fourteenth Amendment to the Constitution of the United States because it made this plaintiff in error's decedent's failure to examine the bank, at a time when it was impossible for him to examine the bank, conclusive proof of his knowledge of the insolvent condition of the bank. And that for these reasons the judgments of the Supreme Court of the State of Kansas, reversing the judgments in favor of this plaintiff in error in the trial court and remanding the causes for judgment against this plaintiff in error should be reversed.

Respectfully submitted,

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Apr. 9, 1928

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In the Supreme Court of the United States

OCTOBER TERM, 1927.

H. F. FERRY, PLAINTIFF IN ERROR, VS. ALICE M. RAMSEY, ET AL., DEFENDANTS IN ERROR.	Nos. 407, 409, 411, 413, 415, 417.
C. L. HARRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF T. A. KRAMER, DECEASED, PLAINTIFF IN ERROR, VS. ALICE M. RAMSEY, ET AL., DEFENDANTS IN ERROR.	Nos. 408, 410, 412, 414, 416, 418.

MOTION TO DISMISS WRIT OF ERROR OR IN THE ALTERNATIVE IF DISMISSAL IS NOT PROPER TO AFFIRM.

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In the Supreme Court of the United States

OCTOBER TERM, 1927.

H. F. Ferry, Plaintiff in Error, vs. Alice M. Ramsey, C. L. King and L. D. Hadley, Defendants in Error.	No. 407.
C. L. Harris, as Executor of the Last Will and Testament of T. A. Kramer, Deceased, Plaintiff in Error, vs. Alice M. Ramsey, C. L. King, H. F. Ferry, et al., Defendants in Error.	No. 408.
H. F. Ferry, Plaintiff in Error, vs. W. O. James, C. L. King and L. D. Hadley, Defendants in Error.	No. 409.
C. L. Harris, as Executor of the Last Will and Testament of T. A. Kramer, Deceased, Plaintiff in Error, vs. W. O. James, C. L. King, H. F. Ferry, et al., Defendants in Error.	No. 410.
H. F. Ferry, Plaintiff in Error, vs. Ramsey Petroleum Company, C. L. King, L. D. Hadley, et al., Defendants in Error.	No. 411.
C. L. Harris, as Executor of the Last Will and Testament of T. A. Kramer, Plaintiff in Error, vs. Ramsey Petroleum Company, C. L. King, L. D. Hadley, et al., Defendants in Error.	No. 412.

H. F. Ferry, Plaintiff in Error,
vs.
G. L. Ramsey, C. L. King, et al., Defendants in Error. — No. 413.

C. L. Harris, as Executor of the Last Will and Testament of T. A. Kramer, Deceased, Plaintiff in Error,
vs.
G. L. Ramsey, C. L. King, H. F. Ferry, et al., Defendants in Error. — No. 414.

H. F. Ferry, Plaintiff in Error,
vs.
M. R. Chastain, C. L. King, L. D. Hadley, et al., Defendants in Error. — No. 415.

C. L. Harris, as Executor of the Last Will and Testament of T. A. Kramer, Deceased, Plaintiff in Error,
vs.
M. R. Chastain, C. L. King, L. D. Hadley, et al., Defendants in Error. — No. 416.

H. F. Ferry, Plaintiff in Error,
vs.
A. E. Lloyd, C. L. King and L. D. Hadley, Defendants in Error. — No. 417.

C. L. Harris, as Executor of the Last Will and Testament of T. A. Kramer, deceased, Plaintiff in Error,
vs.
A. E. Lloyd, C. L. King, and H. F. Ferry, et al., Defendants in Error. — No. 418.

MOTION TO DISMISS WRIT OF ERROR OR IN THE ALTERNATIVE, TO AFFIRM.

The defendants in error, G. L. Ramsey, The Ramsey Petroleum Company, a corporation, W. O. James, M. R. Chastain, Alice M. Ramsey and A. E. Lloyd, move this Honorable Court to dismiss the writs of error, heretofore issued herein, from the Supreme Court of the State of Kansas to the Supreme Court of the United States, or in the alternative if dismissal be not proper, then to affirm the judgment and decision of the Supreme Court of the State of Kansas in the above entitled consolidated cases, for the following reasons, to-wit:

1. The law of the State of Kansas, the constitutionality of which is challenged herein by the plaintiffs in error is not in contravention of the Fourteenth Amendment to the Constitution of the United States of America, and therefore no substantial federal question is involved or raised.

2. Neither the law of the State of Kansas, the validity of which is challenged herein, nor the decision and judgment of the Supreme Court of the State of Kansas upon which error is sued, denies due process of law or equal protection of the law to the plaintiffs in error.

3. The court is without jurisdiction for want of necessary parties as plaintiffs in error for the reason that no request and refusal to join is shown and no

citation and summons and severance has been had as to the various parties defendant in the actions.

Wherefore, these moving defendants in error pray the court to either dismiss the writs of error heretofore granted in the foregoing actions, or to affirm the judgment of the Supreme Court of the State of Kansas rendered therein, respectively, and to adjudge to these moving defendants in error, respectively, just damages for the delay, and in support of this motion, brief and argument are herewith submitted.

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BRIEF ON MOTION TO DISMISS OR IN THE ALTERNATIVE IF DISMISSAL BE NOT PROPER TO AFFIRM.

STATEMENT.

Section 9-163 of the Revised Statutes of Kansas of 1923, reads as follows:

> "It shall be unlawful for any president, director, manager, cashier or other officer of any banking institution, to assent to the reception of deposits or creation of debts by such banking institution, after he shall have had knowledge of the fact that it is insolvent or in failing circumstances; and it is hereby made the duty of every such officer, agent or manager of such banking institution to examine into the affairs of the same, and, if possible, know its condition. And upon failure of any such person to discharge such duty, he shall, for the purpose of this act, be held to have had knowledge of the insolvency of such bank, or that it was in failing circumstances. Every person violating the provisions of this section shall be individually responsible for such deposits so received, and all such debts so contracted; *Provided*, Any director who may have paid more than his share of the liabilities mentioned in this section may have the proper remedy at law against such other persons as shall not have paid their full share of such liabilities" (L. 1879, ch. 47, No. 1; March 15).

Section 9-164 of the Revised Statutes of Kansas of 1923, reads as follows:

> "In all suits brought for the recovery of the amount of any deposits received or debt so created, all officers, agents, or managers of any such banking institutions, charged with having so assented to the reception of such deposit, or the creation of such debt, may be joined as defendants or proceeded against severally; and the fact that such banking institution was so insolvent or in failing circumstances at the time of the reception of the deposit charged to have been so received, or the creation of the debt charged to have been so created, shall be *prima facie* evidence of such knowledge and assent to such deposit or creation of such debt on the part of such officer, agent or manager so charged therewith" (L. 1879, ch. 47, No. 2; March 15).

Section 9-166 of the Revised Statutes of Kansas of 1923, reads as follows:

> "This act shall extend to and may be enforced by and against executors and administrators of such deceased officers, agents and managers" (L. 1879, ch. 47, No. 4).

The defendants in error, G. L. Ramsey, The Ramsey Petroleum Company, a Corporation, W. O. James, M. R. Chastain, Alice M. Ramsey and A. E. Lloyd, each as plaintiff commenced his separate action in the District Court of Butler County, Kansas, against C. L. King, H. F. Ferry, A. B. Ewing, L. D. Hadley, T. A. Kramer, G. W. Lyon and E. F. Adams, as defendants, to recover certain deposits of money al-

leged to have been made by such plaintiffs in the Butler County State Bank of El Dorado, Kansas, at a time when said bank was insolvent or in failing circumstances, of which condition such defendants had knowledge or by an examination into the affairs of said bank, which it was their duty to make, they could have ascertained such knowledge, and to the reception of which deposits the defendants were charged with having assented to; such defendants being officers and directors of said bank at the time of the reception of such deposits.

After the commencement of such actions the defendant, T. A. Kramer, died testate, and such actions were duly revived as against C. L. Harris who had been duly appointed by the Probate Court of Butler County, Kansas, as executor of the last will and testament and estate of said T. A. Kramer, and who had accepted such appointment and legally qualified as such executor.

In each of such actions, judgment was sought against the defendants and each of them for the balance remaining of the deposits so made in said bank on March 30th, 1923, with interest at six per cent from such date, and for costs and general relief, and on which date said bank was closed by order of the State Bank Commissioner of the State of Kansas and liquidation thereof commenced.

In the trial court, judgment was rendered in each action in favor of the plaintiff and against defendants, C. L. King, H. F. Ferry, L. D. Hadley, and A. B. Ewing, for the amount of the deposits remaining in

said bank on the date of the closing thereof, with six per cent interest from such date, and costs; and judgment was rendered against the plaintiff in each of said actions for costs and in favor of defendant, C. L. Harris, as such executor.

In each action the plaintiff appealed to the Supreme Court of the State of Kansas from the judgment in favor of the executor for costs, and the defendants, King, Ferry, Ewing and Hadley, separately appealed to the Supreme Court of the State of Kansas from the judgment so rendered against them.

The respective judgments rendered against the defendants, King, Ferry, Ewing and Hadley, were by the Supreme Court of the State of Kansas, affirmed.

The judgment of the trial court in favor of defendant Harris, as such executor, for costs was reversed by the Supreme Court of the State of Kansas, with directions to the trial court to render judgment in each case for the plaintiff as against the defendant Harris as executor, for the amount of the deposits remaining in said bank at the time of the closing thereof, with interest and costs.

ARGUMENT.

The Statutes of the State of Kansas under which these actions were brought is not in contravention of the Fourteenth Amendment to the Constitution of the United States of America, for the reason that such statutes constitute only an exercise of the police power inherent in the state with reference to the conducting and regulating of the banking business as carried on by banking corporations which derive their corporate powers under charter granted by the state, and when the legislature of the state determines that the public welfare and the public interest requires, it may then take the business of banking under its control insofar as that business is conducted by banking corporations deriving their authority and corporate existence and corporate powers from the state.

Noble State Bank v. *Haskell*, 219 U. S. Reports, 104.

Noble State Bank v. *Haskell*, 219 U. S. Reports, 571.

Whitman v. *National Bank of Oxford*, 176 U. S. Reports 559.

Jones National Bank v. *Yates*, 240 U. S. Reports 41.

The statutes involved are not violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States, nor does it deny to the plaintiffs in error the equal protection of the law.

The Fourteenth Amendment is concerned with the substance and not with the forms of procedure, and the due process clause does not guarantee to a citizen

of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceedings and the character of the rights which may be executed by it.

In the exercise of the police power, reasonable classifications may be freely applied, and such regulation is not violative of the equal protection clause merely because it is not all embracing.

The law of Kansas under consideration relates to a business affecting the public welfare of every citizen of the State of Kansas, and to a business which is impressed with a public interest and insofar as it may, provides rules of conduct or prescribed duties to be performed and obligations and liabilities for the failure to discharge such duties, yet it applies with equal uniformity to every officer named in the statute, and it applies with equal uniformity to the business to which it relates, and therefore it is not violative of the due process clause or of the equal protection of the law clause of the Fourteenth Amendment to the Constitution of the United States.

State of Missouri, ex rel Herwitz v. *North, et al*, 271 U. S. Reports 40.
Zucht v. *King, et al.*, 260 U. S. Reports 174.
Hess v. *Pawloski*, 47 Sup. Ct. Rep. 632.
Buck v. *Bell*, 47 Sup. Ct. Rep. 584.
Village of Euclid, Ohio, et al. v. *Ambler Realty Company*, 47 Sup. Ct. Rep. 114.
Tinsley v. *Anderson*, 171 U. S. Reports 101.
Williams v. *Eggleston*, 170 U. S. Reports 304.
Western Turf Association v. *Greenberg*, 204 U. S. Reports 359.

When the defendants accepted the office of director, president or cashier in the Butler County State Bank, they accepted it subject to all of the requirements, obligations, and liabilities imposed by the statute. The prohibitions and requirements of the statute are positive and mandatory. Failure to conform to the rule of conduct laid down in the statute imposed, the liability thereby created, and from which there is no escape. By the acceptance of the position of director or president or cashier, a contractual obligation was assumed to the depositor. This contractual relationship was liability to the depositor for the amount of the deposits he might make in the event of the failure of the director, or other officer named by the statute, to conform to the rule of conduct laid down in the statute.

Whitman v. *National Bank of Oxford*, 176 U. S. Reports 559.

The fact that the statute holds the director to possess knowledge of the insolvency or the failing circumstances of the bank if he fails to discharge the duty imposed by statute, and the fact that the statute provides that if the bank is insolvent or in failing circumstances the fact of such insolvency or such failing circumstances shall constitute *prima facie* evidence of knowledge and assent to the making of such deposit on the part of the officer or director so charged, does not deprive equal protection of the law nor deny due process of law.

Liability cannot exist upon the failure to discharge the duty imposed by the statute alone, or the

lack of knowledge, or ignorance on the part of the person sought to be charged, but it must be affirmatively proven that insolvency exists, or failing circumstances exist, and when insolvency or failing circumstances is established as a fact, then knowledge of that fact is held to the director if he fail to discharge the duty imposed by the statute, and the proof of such insolvency or failing circumstances constitutes *prima facie* evidence of knowledge thereof, and of assent to the making of the deposit.

The officer or director charged with violation of the statute has the right to defense on the issue of insolvency or failing circumstances, but he does not have the right to set up his ignorance occasioned by failure to discharge the duty imposed by statute as a defense against the liability thereof.

The right to conduct business in the form of a corporation is not a natural or fundamental right, but it is a creature of law, and a state in authorizing corporations to carry on business may qualify the privilege by imposing such conditions as reasonably may be deemed expedient.

It is one thing to attribute effect to the convention of parties entered into under the admonition of the law and another thing to give circumstances, maybe accidental, conclusive presumption and proof to establish and force a result against property or liberty.

Martin v. *Webb*, 110 U. S. Reports 7.
Finn v. *Brown*, 142 U. S. Reports 56-72.
Savings and Commercial Bank v. *Anderson, et al.*, 132 Pacific 755.
238 U. S. Reports 611.
Orient Insurance Company v. *Daggs*, 172 U. S. Reports 577.
Prudential Insurance Company of America v. *Cheek*, 259 U. S. Reports 530.
Yee Hem v. *U. S.*, 268 U. S. Reports 178.

Liability is to be Determined by the Law Involved.

When the State of Kansas enacted the provisions of the statute hereinbefore set forth, they laid down the yardstick by which the liability of the director or officer of the bank was to be measured, and such statute contains the rule by which to measure the right to recover from directors for loss occasioned from violation of the duty expressly imposed by the law.

McCormick v. *King*, 241 Federal 737.
Yates v. *Jones National Bank, supra.*
Thomas v. *Taylor*, 224 U. S. Reports 73.
Bowerman v. *Hamner as Receiver*, 250 U. S. Reports 504.
The Steel Trader, 10 Federal (2d) 251.

This court is without jurisdiction for want of necessary parties as plaintiffs in error.

We submit that the court is without jurisdiction in these cases for want of necessary parties. The writs of error involved herein, are from the Supreme Court of the State of Kansas to this Honorable Court. The cause of action in each and every case in which the judgment complained of was rendered against C. L. Harris, as executor of the last will and testament and estate of T. A. Kramer, deceased, and on which writ of error is sued by Harris as executor, is the same cause of action in each case on which the judgment complained of was rendered against H. F. Ferry on which writ of error is sued by Ferry, and is the same identical cause of action in each case in which judgment was rendered against C. L. King, A. B. Ewing and L. D. Hadley.

The cause of action in each case is a joint cause of action and all defendants against whom judgment was allowed are jointly liable for the full amount, and there can be but one satisfaction to the judgment holder, and any judgment debtor paying the judgment has his remedy under the statutes involved, against his co-defendant for contribution for his part thereof.

In the writs of error sued out by plaintiff in error C. L. Harris, as executor of the last will and testament of T. A. Kramer, deceased, King, Ewing, Hadley and Ferry did not join as plaintiff in error, and no request and refusal to join is shown and no citation and summons and severance has been had.

In the writs of error sued out by plaintiff in error H. F. Ferry, King, Ewing, Hadley and Harris, as executor, did not join as plaintiff in error, and no request and refusal to join is shown, and no citation and summons and severance has been had.

Therefore, the writs of error are fatally defective for want of necessary parties, as a reversal herein would add largely to the burden of the defendant not joined as plaintiffs in error, placing upon them the entire burden of the judgments and relieving the plaintiff in error therefrom.

Beardsley v. *Ark. & La. Ry. Co.*, 158 U. S. Reports 123.
Masters v. *Herndon*, 10 Wall., 416.
Garcia v. *Velv*, 216 U. S. Reports 598.
Mason v. *U. S.*, 136 U. S. Reports 581.
Hardee v. *Wilson*, 146 U. S. Reports 179.
American Surety Company v. *People State of Colorado*, No. 7800, Decided Nov. 12, 1927 (Not yet reported).
Estes v. *Trabue*, 128 U. S. Reports 225.
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Wilson v. *Kiesel*, 164 U. S. Reports 248.

Wherefore defendants in error pray the court to dismiss the writs of error herein, or in the alternative to affirm the judgment of the state court, and to adjudge to the moving parties herein, just damages for the delay, and this brief and argument is submitted in support of this motion.

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Of Eldorado, Kansas,

KARL M. GEDDES,
Of Eldorado, Kansas,

Attorneys for G. L. Ramsey, The Ramsey Petroleum Company, a Corporation, W. O. James, M. R. Chastain, Alice M. Ramsey, and A. E. Lloyd.

Notice of Motion.

The plaintiffs in error are hereby notified that defendants in error, G. L. Ramsey, The Ramsey Petroleum Company, a corporation, W. O. James, M. R. Chastain, Alice M. Ramsey and A. E. Lloyd, will on the 27th day of February 1928, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as hearing may be had, submit for consideration of said court, the within motion and brief in support thereof, hereto attached, all of which are now served upon you herewith.

JOHN J. JONES,
B. R. LEYDIG,
KARL M. GEDDES,
Attorneys for such Defendants in Error.

In the Supreme Court of the United States

OCTOBER TERM, 1927

E. F. Payne, Plaintiff in Error,	Nos.	407
		409
vs.		411
		413
Alice M. Ramsey, et al., Defendants in Error.		415
		417
C. L. Harris, as Executor of the Last Will and Testament of T. A. Kramer, Deceased, Plaintiff in Error,	Nos.	408
		410
		412
vs.		414
Alice M. Ramsey, et al., Defendants in Error.		416
		418

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF DEFENDANTS IN ERROR,

G. L. Ramsey, The Ramsey Petroleum Company, a Corporation, W. O. James, M. B. Chastain, A. E. Lloyd and Alice M. Ramsey.

In Nos. 407, 409, 411, 413, 415 and 417.

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In the Supreme Court of the United States

OCTOBER TERM, 1927.

No. 407.

H. F. Ferry, Plaintiff in Error,

vs.

Alice M. Ramsey, C. L. King and L. D. Hadley, Defendants in Error.

No. 408.

C. L. Harris, as Executor of the Last Will and Testament of T. A. Kramer, Deceased, Plaintiff in Error,

vs.

Alice M. Ramsey, C. L. King, H. F. Ferry, et al., Defendants in Error.

No. 409.

H. F. Ferry, Plaintiff in Error,

vs.

W. O. James, C. L. King and L. D. Hadley, Defendants in Error.

No. 410.

C. L. Harris, as Executor of the Last Will and Testament of T. A. Kramer, Deceased, Plaintiff in Error,

vs.

W. O. James, C. L. King, H. F. Ferry, et al., Defendants in Error.

No. 411.

H. F. Ferry, Plaintiff in Error,

vs.

Ramsey Petroleum Company, C. L. King, L. D. Hadley, et al., Defendants in Error.

No. 412.

C. L. Harris, as Executor of the Last Will and Testament of T. A. Kramer, Plaintiff in Error,

vs.

Ramsey Petroleum Company, C. L. King, L. D. Hadley, et al., Defendants in Error.

No. 413.

H. F. Ferry, Plaintiff in Error,

vs.

G. L. Ramsey, C. L. King, et al., Defendants in Error.

No. 414.

C. L. Harris, as Executor of the Last Will and Testament of T. A. Kramer, Deceased, Plaintiff in Error,

vs.

G. L. Ramsey, C. L. King, H. F. Ferry, et al., Defendants in Error.

No. 415.

H. F. Ferry, Plaintiff in Error,

vs.

M. R. Chastain, C. L. King, L. D. Hadley, et al., Defendants in Error.

No. 416.

C. L. Harris, as Executor of the Last Will and Testament of T. A. Kramer, Deceased, Plaintiff in Error,

vs.

M. R. Chastain, C. L. King, L. D. Hadley, et al., Defendants in Error.

No. 417.

H. F. Ferry, Plaintiff in Error,

vs.

A. E. Lloyd, C. L. King, and L. D. Hadley, Defendants in Error.

No. 418.

C. L. Harris, as Executor of the Last Will and Testament of T. A. Kramer, Deceased, Plaintiff in Error,

vs.

A. E. Lloyd, C. L. King, and H. F. Ferry, et al., Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF DEFENDANTS IN ERROR,

G. L. Ramsey, The Ramsey Petroleum Company, a Corporation, W. O. James, M. R. Chastain, A. E. Lloyd and Alice M. Ramsey. In Nos. 407, 409, 411, 413, 415 and 417.

STATEMENT.

Section 1 of Article 12 of the Constitution of Kansas reads as follows:

"Corporate Powers. The legislature shall pass no special act conferring corporate powers.

Corporations may be created under general laws; but all such laws may be amended or repealed."

Section 9-101 Revised Statutes of Kansas, 1923, reads as follows:

"Incorporation and powers of banks. Any five or more persons may organize themselves into a banking corporation, and shall be permitted to carry on the business of receiving money on deposit and to allow interest thereon, giving to the person depositing credit therefor; and of buying and selling exchange, gold, silver, foreign coin, bullion, uncurrent money, bonds of the United States, and of the State of Kansas, and bonds and warrants of cities, counties, and school districts in the State of Kansas, and state, county, city, township, and school bonds issued in other states, of the United States than Kansas, of loaning money on real estate, chattel and personal security, at a rate of interest not to exceed the legal rate allowed by law; of discounting negotiable notes and of notes not negotiable, and to own a suitable building, furniture and fixtures for the transaction of its business, of the value not to exceed one-half of the capital and surplus of such bank: *Provided*, that nothing in this section shall prohibit such bank from holding and disposing of such real estate as it may acquire through the collection of debts due it."

Section 9-163 of the Revised Statutes of Kansas of 1923, reads as follows:

"It shall be unlawful for any president, director, manager, cashier or other officer of any banking institution, to assent to the reception of deposits or creation of debts by such banking institution, after he shall have had knowledge of the fact that it is insolvent or in failing circumstances; and

it is hereby made the duty of every such officer, agent or manager of such banking institution to examine into the affairs of the same, and, if possible, know its condition. And upon failure of any such person to discharge such duty, he shall, for the purpose of this act, be held to have had knowledge of the insolvency of such bank, or that it was in failing circumstances. Every person violating the provisions of this section shall be individually responsible for such deposits so received, and all such debts so contracted: *Provided*, any director who may have paid more than his share of the liabilities mentioned in this section may have the proper remedy at law against such other persons as shall not have paid their full share of such liabilities" (L. 1879, Ch. 47, No. 1; March 15).

Section 9-164 of the Revised Statutes of Kansas of 1923, reads as follows:

"In all suits brought for the recovery of the amount of any deposits received or debt so created, all officers, agents, or managers of any such banking institutions, charged with having so assented to the reception of such deposit, or the creation of such debt, may be joined as defendants or proceeded against severally; and the fact that such banking institution was so insolvent or in failing circumstances at the time of the reception of the deposit charged to have been so received, or the creation of the debt charged to have been so created, shall be *prima facie* evidence of such knowledge and assent to such deposit or creation of such debt on the part of such officer, agent or manager so charged therewith" (L. 1879, Ch. 47, No. 2; March 15).

Section 9-166 of the Revised Statutes of Kansas of 1923, reads as follows:

"This act shall extend to and may be enforced by and against executors and administrators of such deceased officers, agents and managers" (L. 1879, Ch. 47, No. 4).

The defendants in error, G. L. Ramsey, The Ramsey Petroleum Company, a Corporation, W. O. James, M. R. Chastain, Alice M. Ramsey and A. E. Lloyd, each as plaintiff commenced his separate action in the District Court of Butler County, Kansas, against C. L. King, H. F. Ferry, A. B. Ewing, L. D. Hadley, T. A. Kramer, G. W. Lyon and E. F. Adams, as defendants, to recover certain deposits of money alleged to have been made by such plaintiffs in the Butler County, State Bank of El Dorado, Kansas, at a time when said bank was insolvent or in failing circumstances, of which condition such defendants had knowledge or by an examination into the affairs of said bank, which it was their duty to make, they could have ascertained such knowledge, and to the reception of which deposits the defendants were charged with having assented to; such defendants being officers and directors of said bank at the time of the reception of such deposits.

After the commencement of such actions the defendant, T. A. Kramer, died testate, and such actions were duly revived as against C. L. Harris who had been duly appointed by the Probate Court of Butler County, Kansas, as executor of the last will and testament and estate of said T. A. Kramer, and who had accepted such appointment and legally qualified as such executor.

In each of such actions, judgment was sought against the defendants and each of them for the bal-

ance remaining of the deposits so made in said bank on March 30th, 1923, with interest at six per cent from such date, and for costs and general relief, and on which date said bank was closed by order of the State Bank Commissioner of the State of Kansas and liquidation thereof commenced.

In the trial court, judgment was rendered in each action in favor of the plaintiff and against defendants, C. L. King, H. F. Ferry, L. D. Hadley, and A. B. Ewing, for the amount of the deposits remaining in said bank on the date of the closing thereof, with six per cent interest from such date, and costs; and judgment was rendered against the plaintiff in each of said actions for costs and in favor of defendant, C. L. Harris, as such executor.

In each action the plaintiff appealed to the Supreme Court of the State of Kansas from the judgment in favor of the executor for costs, and the defendants, King, Ferry, Ewing and Hadley, separately appealed to the Supreme Court of the State of Kansas from the judgment so rendered against them.

The respective judgments rendered against the defendants, King, Ferry, Ewing and Hadley, were by the Supreme Court of the State of Kansas, affirmed.

The judgment of the trial court in favor of defendant Harris, as such executor, for costs was reversed by the Supreme Court of the State of Kansas, with directions to the trial court to render judgment in each case for the plaintiff as against the defendant Harris as executor, for the amount of the deposits remaining in said bank at the time of the closing thereof, with interest and costs.

ARGUMENT.

This brief is directed to the contentions made in the brief filed herein on behalf of plaintiff in error, H. F. Ferry.

Such plaintiff in error enumerates six reasons why the Kansas law and the judgment and decision of the Supreme Court of the State of Kansas under attack herein, are in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States.

The first five specifications when analyzed may be summed up as follows: (a) Such law and such decision deprives the plaintiff in error of privileges and immunities secured to other citizens of the United States (b) Deprives the plaintiff in error of his property without due process of law (c) Denies the plaintiff in error the equal protection of the law.

The sixth specification or contention of the plaintiff in error deals solely with the question of whether or not the evidence offered in the trial court in such cases was sufficient to establish that the bank was insolvent or in failing circumstances and that the plaintiff knew that the Butler County State Bank was insolvent at the time the defendants in error made their deposits therein, and whether the evidence was sufficient to show that the plaintiff in error assented to the reception of the deposits so made.

These six cases, heretofore consolidated, come to the Supreme Court of the United States on writ of error to the Supreme Court of the State of Kansas.

The sole and only question, therefore, before this court is whether or not the Kansas law, the constitutionality of which is challenged by plaintiff in error, is in contravention of the Fourteenth Amendment to the Constitution of the United States.

The verdict of the jury rendered in the trial court was a general finding against the plaintiff in error, H. F. Ferry, on all of the issues of fact in controversy in the case.

This finding is conclusive and is abundantly sustained by the findings of the Supreme Court of the State of Kansas in its judgment and decision now questioned in these writs of error (Transcript of Record 348).

On proceedings in error in this court for the review of a judgment of the supreme court of a state, all questions of fact are to be considered as settled by the decision of the state court.

Atchison, Topeka & Santa Fe Railroad Co. v. *Matthews*, 174 U. S. 96.
Herrick v. *Railroad*, 167 U. S. 673.

The statutes of Kansas under which these actions were brought are an exercise of the police power and do not offend or contravene against the Fourteenth Amendment.

The Statutes of the State of Kansas under which these actions were brought is not in contravention of the Fourteenth Amendment to the Constitution of the

United States of America for the reason that the law embodied in such statutes constitutes only an exercise of the police power inherent in the state with reference to the conducting and regulating of the banking business as carried on by banking corporations which derive their corporate powers under charter granted by the state, and when the legislature of the state determined that the public welfare and the public interest requires, it may then take the business of banking under its control insofar as that business is conducted by banking corporations deriving their authority and corporate existence and corporate powers from the state.

Noble State Bank v. *Haskell*, 219 U. S. 104.
Noble State Bank v. *Haskell*, 219 U. S. 571.
Whitman v. *National Bank of Oxford*, 176 U. S. 559.
Jones National Bank v. *Yates*, 240 U. S. 541.

The statutes involved are not violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States nor does it deny to the plaintiff in error the equal protection of law.

This court has quite generally and on various subjects upheld state laws passed in the exercise of the police power.

In the exercise of the police power reasonable classifications may be freely applied and such regulation is not violative of the equal protection clause, nor the due process clause, merely because such classification is not all embracing and neither do such classifications deprive a citizen of privileges and immunities secured to other citizens of the United States. The law

of Kansas under consideration, relates to a business which is impressed with a public interest and which vitally affects the public welfare of every citizen of the State of Kansas. It was within the power of the State of Kansas, therefore, by proper act of its legislature in the exercise of the police power to prescribe rules of conduct to be followed by state banking corporations engaging in the banking business in Kansas, and to prescribe duties to be performed by those persons engaged in carrying on such business in a corporate capacity and to provide obligations and liabilities to be discharged and assumed by such persons for the failure to discharge the duties laid down by the statute, but it will be observed that every rule of conduct and every duty to be performed and every obligation and liability imposed for the failure to discharge such duty, applies and rests with equal uniformity to and upon every officer of all such banking corporations named in the statute, and applies with equal uniformity to the business to which the statute relates; and therefore it is not violative of the due process clause or the equal protection of the law clause of the Fourteenth Amendment to the Constitution of the United States, and neither does it deprive any citizen of any privilege or immunity held by other citizens of the United States.

The Kansas law applies generally to every state banking corporation engaging in the banking business in Kansas exactly the same and every requirement, duty, obligation or liability by it prescribed, created or imposed, applies exactly the same upon the designated officers and directors of all such banking corporations.

Under the Kansas law no citizen was required or compelled to engage in the business of operating a state banking corporation nor was he required or compelled to become an officer or director or cashier or managing agent thereof, but when the citizen did so engage in such business and in such official capacity, he did so voluntarily, but with the permission of the state and on the basis and within the limitations and subject to the regulations and liabilities prescribed in the law.

The plaintiff in error as the cashier and director of the Butler County State Bank of Eldorado, Kansas, established between himself and the depositor of his bank, a contractual obligation; this contractual obligation was liability to the depositor for the amount of the deposits he might make in the banking institution in the event of the failure of the director or other officer named by the statute, to conform to the rule of conduct laid down in the statute, and the failure to conform to this rule of conduct laid down in the statute imposed the liability created by the statute and from which there is no escape on the part of the director, cashier or other officer named in the statute.

The convention of the parties, that is as between the director or other officer named in the statute and the depositor, is one entered into under the admonition of the law.

The right to conduct business in the form of a corporation is not a natural or fundamental right, but it is a creature of law and a state in authorizing corporations to carry on business may qualify the privilege by

imposing such conditions as reasonably may be deemed expedient.

Louisville & Nashville Railroad Co. v. *Spencer Metton*, 218 U. S. 36.
State of Missouri ex rel. Herwitz v. *North, et al.*, 271 U. S. 40.
Zucht v. *King, et al.*, 260 U. S. 174.
Hess v. *Pawloski*, 274 U. S. 352.
Buck v. *Bell*, 274 U. S. 200.
Village of Euclid, Ohio, et al. v. *Ambler Realty Co.*, 272 U. S. 465.
Tinsley v. *Anderson*, 171 U. S. 101.
Williams v. *Eggleston*, 170 U. S. 304.
Western Turf Association v. *Greenburg*, 204 U. S. 359.
Magoun v. *Illinois Trust & Savings Bank*, 170 U. S. 294.
Orient Insurance Co. v. *Daggs*, 172 U. S. 557.
Minnesota Iron Co. v. *Kline*, 199 U. S. 593.
Railway Company v. *Matthews*, 165 U. S. 1.
Barbier v. *Connolly*, 113 U. S. 27.
Whitman v. *National Bank of Oxford*, 176 U. S. 559.
Prudential Insurance Company of America v. *Cheek*, 257 U. S. 530.

When a litigant has had full opportunity in the state courts to present his defense there has been a full compliance with the Fourteenth Amendment, and he has not been denied due process of law.

In all of these cases which the plaintiff in error, H. F. Ferry, asked this court to review, he was duly served with process, appeared by counsel, demurred to the pleadings and answer thereto, produced witnesses at the trial, offered his testimony, and was given every opportunity to make, and did make such defense as he desired to the trial court and the jury. When the ver-

dict went against him he appealed to the Supreme Court of the State of Kansas where he had a full and unrestricted hearing. This court, in a long line of decisions, has held that such a course of legal procedure meets all the requirements of the due process clause of the Fourteenth Amendment.

Iowa Central Railroad Co. v. *Iowa*, 160 U. S. 389.
First National Bank v. *Missouri*, 263 U. S. 640.
Missouri ex rel. Herwitz v. *North*, 271 U. S. 40.
Nashville Railway Co. v. *Schmidt*, 177 U. S. 230.
Holmes v. *Conway*, 241 U. S. 631.
Twining v. *New Jersey*, 211 U. S. 119.
Jordan v. *Massachusetts*, 225 U. S. 175.

In *Truax* v. *Corrigan*, 257 U. S. 312-332, this court said:

> "The due process clause requires that every man shall have the protection of his day in court and the benefit of the general law; a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry and renders judgment only after trial so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

The Kansas law under consideration is a general law and under that law the plaintiff in error, H. F. Ferry, when called to accountability to the depositors, had the benefit of every suggestion contained in the foregoing statement as regards the due process clause of the United States Constitution. He had his day in court. He was heard and permitted to make his defense and

judgment was rendered only after trial and he had the right of appeal and review of that judgment.

The presumptions of fact specified in the Kansas law is not violative of any provision of the Fourteenth Amendment to the Constitution of the United States.

The fact that the statute holds the director to possess knowledge of the insolvency or the failing circumstances of the bank if he fails to discharge the duty imposed by statute, and the fact that the statute provides that if the bank is insolvent or in failing circumstances the fact of such insolvency or such failing circumstances shall constitute *prima facie* evidence of knowledge and assent to the making of such deposit on the part of the officer or director so charged, does not deprive equal protection of the law nor deny due process of law.

Liability cannot exist upon the failure to discharge the duty imposed by the statute alone; or the lack of knowledge alone; or ignorance on the part of the person sought to be charged, alone, but it must be affirmatively proven that insolvency exists, or failing circumstances exist and when insolvency or failing circumstances is established as a fact then knowledge of such insolvency or such failing circumstances is held to the director if he had failed to discharge the duty required by the statute.

The statute also provides that when proof of insolvency or failing circumstances is established, then such fact shall constitute *prima facie* evidence of knowledge of such insolvency or such failing circumstances and assent to the reception of the deposits.

The officer or director charged with violation of the statute has the right to defense on the issue of insolvency or failing circumstances, but he does not have the right to set up his dereliction or ignorance occasioned by failure to discharge the duty imposed by statute as a defense against the liability thereof.

In analyzing the Kansas law it must be borne in mind that the basic element thereof is insolvency of the bank or failing circumstances of the bank. In the absence of insolvency or failing circumstances no cause of action accrues to the depositor and no presumption is brought into being against the officer named in the statute. The president, cashier, director or other officer named in the statute are the parties who naturally have the means of knowing the financial condition of the banking institution they are carrying on. They have access to all of its books and records and papers, and it is incumbent upon them and justly so, to examine their bank with reasonable frequency and, if possible, know its condition, and when insolvency or failing circumstances exist such persons naturally must know of the existence of that fact and when with such knowledge the banking institution is kept open from day to day and the usual ordinary business is carried on and deposits are received, they cannot be heard to say that they did not assent to the reception of such deposits, and they cannot justly complain because the statute provides that the insolvency or failing circumstances of the bank, when existing as a fact, shall constitute *prima facie* evidence that they had knowledge of such fact and assented to

the reception of such deposits or the creation of such debt.

Martin v. *Webb*, 110 U. S. 7.
Finn v. *Brown*, 142 U. S. 56-72.
Savings and Commercial Bank v. *Anderson, et al.*, 132 Pac. 755; 238 U. S. 611.
Yee Hem v. *U. S.*, 268 U. S. 178.
Campbell v. *Watson*, 50 Atl. 120-139.
Ellis, et al. v. *H. P. Gates Mercantile Co. et al.*, 60 Southern 649-651.
United Society of Shakers v. *Underwood*, 9 Bush (Ky.) 609.
Morse on Banks and Banking, 90 *et seq.*, 97 *et seq.* and 115.
Merchants Bank v. *Rudolph*, 5 Nebr. 527.
Auten v. *U. S. National Bank*, 174 U. S. 147.

That a state may by legislative act declare proof of one fact presumptive evidence of another if there is rational connection between them has been repeatedly declared as the law of the land by this court.

James-Dickinson Farm Mortgage Co., et al. vs. Harry, 273 U. S. 119.
Hawes v. *Georgia*, 258 U. S. 1.

That there is a rational connection between the fact of insolvency of a bank, or failing circumstances of a bank, and the fact of knowledge thereof and assent to the reception of deposits at that time, does not need argument or authority to support it.

Much is said in the brief of plaintiff in error with reference to the provision of the Kansas statute which provides that upon the failure to discharge the duty laid down in the statute that the officer or director named in the statute shall be held to have had knowledge of the

insolvent condition of the bank or its failing circumstances if it is in fact proven to have been insolvent or in failing circumstances and that the fact of such insolvency or failing circumstances shall be *prima facie* evidence of such knowledge and of assent to the reception of such deposits.

It is argued on behalf of plaintiff in error in this connection that the evidence neither established insolvency nor failing circumstances. We take it that discussion of what the evidence did or did not prove is not the vital question before this court for solution, because the facts found by the Supreme Court of Kansas in its decision is final on that question, but inasmuch as counsel has seen fit to lay great stress upon the evidence we direct the court's attention to some of the facts disclosed by the record.

The record discloses that during all of the time from March, 1920, down to the 30th day of March, 1923 the date of the closing of the bank, that this bank was operated in absolute violation of law and in absolute violation of the requirements made from time to time by the various bank examiners who made examination of its affairs from time to time, and that the plaintiff in error and the other officers and directors actually knew that he was conducting the bank in violation of law and in violation of the requirements of the Banking Department of the State of Kansas.

This bank was examined by a deputy bank commissioner of Kansas on March 23rd, 1920, the examination reduced to writing and various requirements made which

requirements in writing were personally received by the plaintiff in error, and at that time it had overdrafts in excess of $23,000.00 and it had excess loans in excess of $425,000.00 (Transcript 278-279).

The same examiner examined the bank in September of 1920, and at that time it still had overdrafts of an excess of $23,000.00 and excess loans in excess of $500,000.00, and at that time the examiner gave written notice and written requirements to the plaintiff in error which were by him personally received (Transcript 277-278).

The bank was again examined in March, 1921. It had overdrafts in excess of $18,000.00. It had excess loans in excess of $731,000.00 (Transcrit 276-277).

It was again examined by the deputy Bank Commissioner in September of 1921 and it had overdrafts in excess of $17,000.00 and excess loans in excess of $800,000.00. That examination was reduced to writing and requirements made by the examiner and delivered to the plaintiff in error (Transcript 274-275).

It was again examined by a deputy Bank Commissioner in January of 1922. It had overdrafts in excess of $13,000.00 and seventeen excess loans in excess of $782,000.00, and this examination was reduced to writing and requirements made by the examiner and delivered to the plaintiff in error (Transcript 271-274).

It was again examined in October of 1922 by a deputy bank commissioner, the examination reduced to writing including the requirements of the examiner and the examination disclosed that it had in excess of $18,000.00

overdrafts and excess loans in excess of $776,000.00 (Transcrit 270-271).

It was again examined in Feb. of 1923 and it had excess loans in excess of $754,000.00 and overdrafts in excess of $21,000.00 and this written examination and the written requirements made by the examiner was delivered to the plaintiff in error (Transcript 267-269).

During all of that time not a single requirement that had been made by any examiner had been complied with by the plaintiff in error in any respect, but rather the requirements of the examiner had been entirely ignored.

During this same period of time the Board of Directors of this bank had from time to time rendered to the State Bank Commissioner of the State of Kansas financial statements which showed every one of these excess loans and the overdrafts (Transcript 130-131) and the Board of Directors of this bank on January 1st, 1920 held their meeting made their report to the Bank Commissioner of the State of Kansas which disclosed a number of these excess loans. Another meeting was held in April, 1920. Another in July, 1920. Another in October, 1920. Another in January 1921; March, 1921; June-July, 1921; October, 1921; January, 1922; April, 1922; July, 1922; October, 1922 and January, 1923, and the plaintiff in error was at every one of those meetings and the report that was sent to the Bank Commissioner of Kansas showing the financial condition of the bank at the time of the meeting disclosed the deplorable condition of this bank (Transcript 130-133).

Now the plaintiff in error knew everything that these reports disclosed. He knew every requirement

that had been made by the Bank Commissioner. He knew that daily the bank was receiving deposits. He knew it was being operated in violation of law. He knew that it was hopelessly insolvent; in fact he knew everything there was to know relative to the condition of his bank from every possible standpoint, and his counsel modestly says in his brief that the plaintiff in error "never entertained the idea that the bank was insolvent * * * expected it to sustain some losses."

Under the conditions of existing facts disclosed by the record the plaintiff in error cannot be heard to say that the bank was not insolvent or in failing circumstances and neither can he be heard to say that he did not have actual knowledge of that fact nor can he be heard to say that he did not assent to the reception of every deposit that was made in the bank during that period of time.

The court will observe that he had sufficient knowledge of the condition of his bank that on the day it closed he had the sum of $1.20 in his personal account on deposit in the bank (Transcript 193).

All of the evidentiary facts herein referred to are fully found by the Supreme Court of the State of Kansas and set out in the opinion of that court (Transcript 348).

This sort of neglect of duty, of attempted asserted ignorance, of persistent violation of law and of the commands of proper constituted authority does not relieve one from the responsibilities placed upon him for such neglect of the performance of such duty,

nor for any ignorance which might be occasioned as a result of such conduct.

Various courts have dealt with that question and in that connection we quote at length from some of those decisions.

> "Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business and to exercise reasonable control and supervision of its officers. They have something more to do than from time to time to elect the officers of the bank and to make declarations of dividends. That which they ought by proper diligence to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business." *Martin* v. *Webb*, 110 U. S. 7, *Cassidy* v. *Uhlmann*, 63 N. E. 554.
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> "As to the degree of diligence and the extent of supervision to be exercised by directors, there can be no room for doubt under the authorities. It is such diligence and supervision as the situation and the nature of the business requires. The duty is to watch over and guard the interests committed to them. In fidelity to their oaths and to the obligations they assume, they must do all that reasonably prudent and careful men should do for the protection of the interests of others entrusted to their charge." From dissenting opinion, Justice Harlan, with whom concurred Justices Gray, Brewer and Brown, in *Briggs* v. *Spaulding*, 141 U. S. 132. The dissenting opinion quotes, with approval, *Martin* v. *Webb*, *supra*.

"One who voluntarily takes the position of director and invites confidence in that relation, undertakes, like a mandatory, with those whom he represents and for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties. Such is the rule applicable to public officers, to professional men and to mechanics, and such is the rule which must be applicable to every person who undertakes to act for another in a situation or employment requiring skill and knowledge; and it matters not that the service is to be rendered gratuitously. These defendants voluntarily took the position of trustees of the bank. They invited depositors to confide to them their savings and to entrust the safekeeping and management of them to their skill and prudence. They undertook, not only that they would discharge their duties with a proper care, but that they would exercise the ordinary skill and judgment requisite for the discharge of their delicate trust. * * *

The ignorance of any fact in the bank's affairs which it is their duty to know can never be set up by them in defense or exculpation for any act which the existence of that fact should have prohibited. * * *

The duties of directors are administrative, relate to supervision and direction, and when it is sought to hold them responsible for a dereliction of duty, because of which a loss occurred to stockholders and creditors, they cannot evade liability by pleading ignorance of the affairs of the institution, incompetency, or gratuitous service, or that the management of the banking business was in the hands of the cashier or other executive officer. Where there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge. While the directors of a corporation may and must, as already stated, commit the details of its business

to inferior officers, this does not absolve them from the duty of maintaining a reasonable supervision; and, if such inferior officers waste the assets of the corporation, it is conceded that the directors cannot escape liability on the ground that they did not know of the wrongdoing, provided that it appear that their ignorance was the result of a want of that care which ordinary, prudent and diligent men would exercise under similar circumstances * * *. And so, also if there is a negligent abandonment of his official duty by a director and if he leaves the entire control of the company's business to other persons and fails to exercise the proper supervision, he is liable for losses which due attention and diligence on his part might have prevented." *Horn Silver Mining Company* v. *Ryan*, 44 N. W. Rep. 56.

"The directors were not mere ornaments to the bank to lure public confidence. When they became directors, the law cast upon them the important duties of supervision and direction, which they could not delegate to the executive officers; and therefore the stockholders and depositors had the right to entrust the institution with their money, in confidence that the directors would perform their duties. When sued for losses which resulted from careless or unlawful acts and unfortunate transactions, they can never set up as a defense that they did not examine the books or accounts of the bank, knew nothing about the loans or discounts, were ignorant of banking business or that they entrusted the management and supervision of the business to the executive officers, in whom they had confidence. The welfare of the public and the interests of the banking institutions alike forbid this." *Campbell* v. *Watson*, 50 Atl. Rep. l. c. 139-140.

"By accepting the position, they assume a capacity to manage the business of the corpora-

tion and impliedly undertake to use as much diligence and care as the proper performance of the duties of their office requires, and to give the enterprise the benefit of their best care and judgment. They are bound to manage the affairs of the company with the same degree of care and prudence which is generally exercised by business men in the management of their own affairs, and the fact of the service without compensation does not permit a less degree of activity. They must be diligent and careful in performing the duties they have undertaken, and imprudence and negligence cannot be excused on the ground of ignorance or inexperience or the honesty of intention. * * * They are not permitted to evade or delegate their powers and important duties, and their supervision must be such as would enable them at all times to know the general financial condition of the corporation and to check or prevent any imprudent or dishonest conduct in officials. * * * They are bound to know the character and habits of the officers whom they employ, and they cannot be heard to say that they were ignorant of facts, the existence of which are shown by the books and papers of the corporation, and which would be known to them but for their neglect or inattention to the business; and they are responsible for loss resulting from the wrongful acts or omissions of other directors or agents, where such loss was a consequence of their own neglect of duty, either in failing to supervise the company's business with proper attention or in neglecting to use proper care in the appointment of such agents.

* * * The fact that directors of a corporation do and must commit the details of its business to executive and inferior officers does not absolve them from the duty of maintaining a reasonable supervision, and, if such officers waste the assets of the corporation, the directors, ordi-

narily, cannot escape liability on the ground that they did not know of the wrongdoing, where it is made to appear that their ignorance was the result of want of that care which ordinarily prudent and diligent men would exercise under similar circumstances. * * *

* * * Directors are charged with knowledge, when, by the exercise of ordinary care, they might have known, as it was their duty to know, that loans were made in excess of the statutory limit * * *.

* * * *With reference to banks, at least it has been said that directors are conclusively presumed to know the condition of the bank, and that, if this were not true, they would be privileged to be negligent; and the more ignorant they could manage to be about its condition, the more secure they would be from liability.*" *Ellis et al.* v. *H. P. Gates Merc. Co., et al.*, 60 So. Rep. 649-651. Thompson's Commentaries on the Law of Private Corporations, page 270.

It is stated in Bolles' Law of Banking, page 185, that:

"That tendency is to hold directors liable when they would have known the condition of their bank, had they attended to their duty."

Finn v. *Brown*, 142 U. S. Reps. 56-72.

Martin v. *Webb*, 110 U. S. Reps. 7.

"A person who holds the office of director and vice-president of a bank, and at the same time has private and personal dealings with the bank, is conclusively presumed to know (so far as the same affects his said personal dealings), the general condition and management of his bank, and to know everything of importance that occurs therein, either at the time it occurs, or soon thereafter * * *.

* * * For while we assume as a matter of fact that the defendant knew nothing of the con-

dition or management of said bank and nothing of the condition of Herman's account with the bank, yet still as a matter of law we think we must presume that he knew all about these matters. He was a director, and the vice-president of the bank, and it was his duty to have such knowledge, and therefore the law will conclusively presume that he had it (*Merchants' Bank* v. *Rudolph,* 5 Neb. 527; *United Society of Shakers* v. *Underwood,* 9 Bush. (Ky.) 609; Morse on Banks and Banking, 90 *et seq.*, 97 *et seq.* and 115). He cannot now, as against the interests of the bank and its stockholders, and perhaps its creditors, be allowed to plead ignorance and innocence, and thereby profit by his own want of knowledge, and by his own failure to do his duty as an officer of the bank. Such would be against both morals and law. Of course, we do not hold that a director is bound to know everything that transpires in a bank, and at the very time when it occurs. But we do hold that a director having personal and private dealings with his bank is bound to know (so far as the same affects his said personal dealings) the general condition and mangement of his bank, and everything of importance that occurs therein, either at the time it occurs, or soon thereafter." *Savings Bank* v. *Wulfekuhler,* 19 K. 60-63-64.

"Its knowledge and purpose is the knowledge and purpose of the bank; and here we meet the proposition upon which the defendant rests; that the directors are in law conclusively presumed to know the condition of the bank, its business, receipts and expenditures, and all the general facts which go to make up that condition and business, as shown by the entries on its regular books; and in support of this proposition are cited the cases of *Bank* v. *Rudolph,* 5 Neb. 527; *Rich* v. *Banks,* 7 Neb. 201; *Bank* v. *Wulfekuhler,* 19 Kas. 60; *Arlington* v. *Pierce,* 122 Mass. 270;

Dunn v. *St. Andrews Church,* 14 Johns, 118; *Bank* v. *Dandridge,* 12 Wheat, 65; Morse on Banks and Banking, pp. 90, 91; Bigelow on Estoppel, 1st ed., p. 549; and Green's Brice's Ultra Vires, 2nd ed., ch. 6.

In 5 Neb., *supra,* it is said:

> 'It is insisted that being the vice-president and one of the directors of the bank, he was in a situation which required him to know the condition of its business, and must be conclusively presumed to have known whether said note had been paid or not. No case directly in point has been cited, but we apprehend that the rule contended for is the correct one. In Morse on Banks and Banking, pp. 90, 91, the author thus states the rule: "The general control and government of all the affairs and transactions of the bank rests with the board of directors. For such purposes the board constitutes the corporation, and uniform usage imposes upon them the general superintendence and active management of the corporate concerns. They are bound to know what is done, beyond the merest matter of daily routine, and they are bound to know the system arranged for its doing." '

And in Bigelow, *supra,* we find the doctrine thus laid down:

> 'In accordance with the principles in the above cases, directors of corporations being bound to know the proceedings of the body, cannot escape an estoppel by the allegation of ignorance.' "

National Bank v. *Drake,* 29 Kas. 325-326.
Auten v. *U. S. National Bank,* 174 U. S. 147-148.

"The law imposes certain duties which are obligatory and from which a director cannot be

excused. A failure to perform duties which the law imposes makes the director who wilfully neglects such duties after being duly qualified in office liable in civil damages to the person or persons injured by such gross neglect. * * * The directors are liable in failing to perform duties required and imposed by the statute, but it must be inferred that their acts were unintentional." Megee on Banks and Banking, Third Ed., 98-99.

"They are bound to know all that is done beyond the merest matter of routine." MaGee on Banks and Banking, Third Ed., page 96.

The statute contains within itself a declaration of substantive law.

That provision of the statute under attack which reads: "and upon failure of any such person to discharge such duties, he shall for the purpose of this act be held to have had knowledge of the insolvency of such bank or that it was in failing circumstances" is merely a declaration of substantive law.

The duty is for the director or other officer named in the statute, to carefully, frequently and exhaustively examine into the affairs of the bank of which he is such officer, and to know its condition if possible to know it.

Substantive law is that part of the law which creates, defines and regulates rights as opposed to adjective or remedial law which prescribes the method of enforcing rights or obtaining redress for their invasion.

Mix v. *Board of County Commissioners*, 18 Idaho 695; 32 L. R. A. (n. s.) 534.

Black's Law Dictionary Under Substantive Law, page 1132.

The statute imposed on the director, or other officer named in the statute, a duty to be performed and it contained within itself certain prohibitions. The reason the statute imposed a duty and prohibited the doing of certain other acts was the better protection and benefit of the depositors who entrusted their money to the bank relying upon the ability, fidelity and vigilance of the officers and directors of the bank.

The engagement of the director or other officer charged, therefore, falls within the rule:

> "That where the statute prohibits the doing of an act or imposes a duty on one for the benefit and protection of individuals, if he disobeys the prohibitions, or neglects to perform the duty, he is liable to those for whose protection the statute was enacted."
>
> *Baxter* v. *Coughlan, et al.*, 72 N. W. 797.

The plaintiff in error stands upon a different footing and in a different relationship as regards the application of the Fourteenth Amendment to the Constitution, from the footing and relationship of a natural citizen.

At the time the plaintiff assumed the office of director in the bank and at all times since, he had under the law of Kansas, no natural right of a citizen to engage in the banking business.

He could only engage in the banking business in a corporate capacity in accordance with the terms and conditions prescribed by the law of the State of Kansas and under the limitations and restrictions and subject to the obligations, liabilities and requirements of that law. Sections 9-101, 9-163, 9-164, 9-166 contains the pertinent provisions under which he could so engage in conducting a banking institution.

He stands before the court as regards his contentions here made, not as a natural citizen, but, rather as an official citizen, a member of a corporate citizen, but with his rights, privileges, obligations, duties and liabilities circumscribed by the provisions of the law laid down in the quoted sections and this official capacity is one that he voluntarily assumed in order that he might be allowed to engage in the conducting of a banking institution under that law.

Blake v. *McClung*, 172 U. S. 239.

We submit that under the authority of that case, that when he invokes the protection of the Fourteenth Amendment to the Constitution he invokes it upon an entirely different footing and basis from that of a natural citizen.

The liability of the officer charged is to be determined by the law involved.

The Kansas law under consideration was placed upon the statute books of Kansas in 1879, and when the Butler County State Bank of El Dorado, Kansas, procured from the State of Kansas a charter of incorporation authorizing it to transact a banking business in such corporate capacity, that law prescribed the rules of conduct to be observed, the duties to be performed, the obligations and liabilities to be imposed for the violation of the mandate of that statute, and when the plaintiff in error, Ferry, voluntarily became a director and cashier of the bank, he immediately was charged with conformity to the rules of conduct,

prescribed the discharge of the duties provided, and under the express provision that his violation of the mandate of the statute would cast upon him the obligations and liabilities provided thereby to the depositor. His engagement entered into with the depositor was one made under the admonition of the law and his duty was to know the condition of his bank and not to receive or permit deposits to be received if the banking corporation was insolvent or in failing circumstances and that he might know its condition in this respect it was his duty to examine into the affairs of the bank diligently, frequently, so that he might have knowledge of the exact condition.

When the State of Kansas enacted the provisions of the statute hereinbefore set forth, they laid down the yardstick by which the director or officer of the bank was to be measured and such statute contains the rule and the exclusive rule by which to measure the right to recover from directors for loss occasioned from the violation of the duty and requirements expressly imposed by the law.

Orient Insurance Company v. *Daggs, supra.*
McCormick v. *King,* 241 Federal 737.
Yates v. *Jones National Bank, supra.*
Thomas v. *Taylor,* 224 U. S. 73.
Bowerman v. *Hamner, as Receiver,* 250 U. S. 504.
The Steel Trader, 10 Federal (2d) 251.

Wherefore these defendants in error pray the court to affirm the judgment of the Supreme Court of

the State of Kansas and to adjudge to them just damages for the delay.

Respectfully submitted,

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